Supreme Court, U.S.
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No. 99- 991647 APR 1 2 2000

IN THE

Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a Virginia corporation, provides professional advice and consulting services to nonprofit organizations that engage in large-scale mailings in order to promote public policy positions, to convey information, and to seek adherents and financial support. The Utah Charitable Solicitations Act, Utah Code Ann. § 13-22-1 *et seq.*, imposes registration and disclosure requirements not just on the organizations that send such mailings into Utah, but on firms, like petitioner, that advise such organizations.

The questions presented are:

1. Whether the registration and disclosure requirements imposed on petitioner violate the First Amendment rights of petitioner and the organizations it advises.

2. Whether the registration and disclosure requirements violate the Commerce Clause, when applied to a firm that, like petitioner, is organized under the laws of another state, does no business in Utah, and has no contact with Utah citizens.

3. Whether the registration and disclosure requirements, as applied to petitioner, constitute extraterritorial legislation in violation of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

All the parties are named in the caption. American Target Advertising, Inc., is a wholly owned subsidiary of The Viguerie Company, a Virginia Corporation.

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PETITION FOR A WRIT OF CERTIORARI

American Target Advertising, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 199 F. 3d 1241. The opinion of the district court (Pet. App. 21a-36a) is reported at 23 F. Supp. 2d 1303.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 *et seq.*, is set forth at Pet. App. 37a-63a.

STATEMENT

This case presents recurring issues of national significance that will greatly affect the availability of one of the most important forms of speech in the United States today. Petitioner American Target Advertising, Inc., (ATA) is a fundraising consultant whose only office and employees are located in Virginia. ATA, like literally hundreds of similar firms, provides advice and related services to nonprofit organizations that wish to use large-scale mailings to promote public policy positions, to convey information, and to seek adherents and financial support. Utah regulates not only the nonprofit organizations that send such mailings into Utah, but organizations like ATA—which does no business in Utah, sends no letters into the state, and does not solicit Utah residents for funds. Utah—like a number of other state and local governments—nonetheless

requires firms like ATA to make extensive and burdensome disclosures, and to obtain a license, before they may give advice—wholly outside of Utah—to nonprofit organizations that mail letters into the state.

These licensing and disclosure requirements are not only highly intrusive; they differ greatly from state to state and locality to locality. As a result, they impose an enormous burden on the ability of firms like ATA to provide professional advice to nonprofit organizations and, as a consequence, on those organizations' ability to communicate with the public. Utah presented no evidence at all of any compensating benefit to the state or its citizens. Neither respondent nor the courts below identified any reason why a state's interests cannot be fully protected by reasonable regulation of the fundraising entities themselves, or by other means that do not restrict First Amendment activities, without imposing a burdensome prior restraint on out-of-state organizations like ATA, and therefore on all nonprofit organizations that rely on the services of ATA and similar firms. The Court should review this important issue in order to clarify the status of an increasingly prevalent form of state and local regulation that both has impermissible extraterritorial effects and severely impedes speech that is at the core of the First Amendment.

1. In 1996, ATA entered into a contract with Judicial Watch, Inc., an ideologically conservative nonprofit corporation located in the District of Columbia. The contract specified that ATA would provide "political and related consulting services" to Judicial Watch (Dist. Ct. App. 4)[1] in connection with letters that Judicial Watch planned to mail throughout the nation. Judicial Watch's letters criticized various high-ranking political officials and described Judicial Watch's activities, including litigation

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[1] "Dist. Ct. App." refers to the appendix filed in the district court.

against these officials.[2] The letters also contained requests for voluntary donations to help Judicial Watch conduct its activities and further promote its nonprofit mission. See Dist. Ct. App. 229-34.

ATA's contract with Judicial Watch stated that ATA "shall prepare creative copy and design, shall act as disclosed agent for the acquisition of production services, shall provide advice about selection of lists for donor acquisition, and shall provide advice about mail dates for mailings conducted by" Judicial Watch. Dist. Ct. App. 16. The contract explicitly stated that "ATA shall not solicit on behalf of" Judicial Watch (*id.* at 17).

2. The Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 *et seq.*, imposes a variety of registration and disclosure requirements on nonprofit organizations that communicate and solicit by mail within the state. See, *e.g.*, Utah Code Ann. §§ 13-22-5, 13-22-9, 13-22-15. The Utah Act is applicable to organizations governed by Section 501(c)(3) of the Internal Revenue Code (charities) as well as organizations governed by Section 501(c)(4) (advocacy groups). See 26 U.S.C. §§ 501(c)(3), 501(c)(4). The Act also makes it "unlawful for any person or entity to act as a * * * professional fund raising counsel or consultant * * * without first obtaining a permit from" the Utah Division of Consumer Protection. Utah Code Ann. § 13-22-9(1). Utah has applied the Act to entities such as ATA whose services are furnished entirely outside the state.

The Act defines a "[p]rofessional fund raising counsel or consultant" as a person who for compensation engages in one or more of the following activities: "plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization" (Utah Code Ann. § 13-22-2 (11)(a)(i)). The Act requires a license without regard to the time, place, or manner

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[2] Judicial Watch, although ideologically conservative, has filed lawsuits against officials of both major political parties.

of these activities, and a fundraising consultant who wishes to obtain a permit must make a variety of disclosures. These include not only extensive details about the organization, personnel, and finances of the consultant—including the "residence addresses of any officer or director" (Utah Code Ann. § 13-22-9(1)(b)(v))—but also "the purpose of the plan, management, advi[c]e, counsel or preparation of materials" offered by the consultant and "the method by which the plan, management, advi[c]e, counsel, or preparation of materials * * * will be organized or coordinated" (Utah Code Ann. § 13-22-9 (1)(b)(viii)(A), (B)).

3. In February, 1997, Judicial Watch applied for a fundraising license in Utah. The Division notified Judicial Watch that it would not grant the license to Judicial Watch until ATA registered with the Division, unless Judicial Watch agreed either not to use ATA as a consultant or not to pay ATA. Pet. App. 23a-24a. Subsequently the Division granted Judicial Watch a license "contingent upon Judicial Watch's promise not to use the services of any professional fund-raising consultant not licensed in Utah in connection with [its] fund-raising activities in Utah." *Id.* at 24a. ATA, which is not licensed in Utah, then brought this action in the United States District Court for the District of Utah, alleging that the Utah Act violates the First Amendment, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment. The district court had jurisdiction under 28 U.S.C. § 1331.

The district court granted Utah's motion for summary judgment. The court rejected ATA's First Amendment claims on the ground that Utah's registration and disclosure requirements "are narrowly tailored to enable private citizens to protect themselves from fraudulent activity" and "do not differ materially from those upheld in" this Court's decision in *Riley v. Federation of the Blind*, 487 U.S. 781 (1988). Pet. App. 27a. (The court reached these conclusions even though Utah had not presented any evidence in support of these contentions, and even though the licensing requirement in *Riley* was held unconstitutional (see 487 U.S. at 802)). The district court stated that Utah's licensing

scheme did not violate the Commerce Clause because it "does not have the practical effect of . . . controll[ing] [professional fund-raisers] in other states" (Pet. App. 34a; internal quotation marks omitted) and because the burdens that the Act imposes on interstate commerce are "minimal by comparison" to its benefits. *Id.* at 35a. The district court also concluded that the Act does not violate the Due Process Clause because ATA "has established minimum contacts with the State of Utah" (Pet. App. 36a), even though, at the time the district court reached this conclusion, no letter prepared under the ATA contract had yet been mailed into Utah.

The court of appeals affirmed in part and reversed in part. The court stated that "the Act is content neutral" and therefore subject only to "intermediate scrutiny." Pet. App. 4a. Without citing any evidence in the record except a broad legislative statement about the general purposes for creating the Utah Department of Commerce, the court asserted that various provisions of the Act "target fraud" (*id.* at 5a) and concluded, on that basis, that "[t]he Act therefore serves a substantial government interest." *Ibid.* The court of appeals acknowledged that the Act "qualifies as a prior restraint" (*id.* at 10a), and it declared unconstitutional certain provisions of the Act on the ground that they gave the Director of the Division of Consumer Protection too much discretion to refuse a license. *Id.* at 11a-15a.[3] The court of appeals nonetheless upheld the licensing scheme as a whole, noting that the Division had created an administrative regulation to process an application within ten days of its receipt and to provide an administrative hearing (although not a decision) within five days of a denial of an application. *Id.* at 15a-17a.

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[3] The court of appeals also declared unconstitutional a provision of the Utah Act that required a fundraising consultant to prove that it was bonded, or to provide a letter of credit or cash in the amount of $25,000. See Pet. App. 7a-9a.

The court of appeals then rejected ATA's claim that the Act violates the Commerce Clause. The court admitted that the Act "certainly burden[s] interstate commerce for out-of-state firms like [ATA]." Pet. App. 18a. But the court characterized the burden as "minimal" (*ibid.*). The court of appeals similarly rejected ATA's argument that the Act violates the Due Process Clause. The court reasoned that ATA, by providing services in Virginia to a District of Columbia nonprofit client, had "purposefully direct[ed] efforts toward residents of the state" (*id.* at 20a) and that ATA therefore had the "minimum contacts" required by the Due Process Clause. Pet. App. 20a.

REASONS FOR GRANTING THE PETITION

The issues raised by this case affect, in the most profound way, what is unquestionably one of the most important First Amendment activities in the nation today, the use of direct mail by nonprofit organizations. The court of appeals' resolution of those issues not only violates core First Amendment principles; it permits states to extend their regulatory authority to organizations like ATA that are located outside of Utah, that do no business in the state, and that never come in contact with citizens of Utah. Utah's extraterritorial regulation of ATA's contract with Judicial Watch would violate the Commerce Clause and the Due Process Clause even if this case involved no First Amendment interest. For Utah to extend its regulatory reach in order to impose a burdensome and utterly unjustified prior restraint on core political speech is a compound and dangerous violation of the Constitution.

This form of regulation is, unfortunately, anything but unusual. At least 42 states, and many localities, have charitable registration laws; at least 28 states impose comparable requirements on fundraising consultants like ATA.[4] These extensive

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[4] These laws are tabulated in the appendix to the amicus curiae brief filed by the Free Speech Defense and Education Fund, et al., in the court of appeals.

and varied regulations have compromised both consultants' ability to give advice and nonprofit organizations' ability to engage in direct mail communications that contain solicitations.

The direct mail communications that are affected by this form of regulation are both a pure form of First Amendment expression and a crucial element in the American system of freedom of expression. Direct mail is specifically designed to give individuals access to information that they would not receive through other media. In particular, direct mail allows organizations to communicate information that is of particular importance to their audiences, to disseminate interactive materials such as surveys and questionnaires, and to facilitate efforts to petition the government for redress of grievances. This case is, therefore, of great national importance: hundreds, or perhaps even thousands, of consultants like ATA are affected, as are perhaps tens of thousands of nonprofit organizations that communicate through direct mail. Indeed, the logic of the court of appeals' decision may extend to communication through the internet as well. The Court should grant review in this case to make clear the status of this widespread and intrusive form of extraterritorial regulation of a vital medium of speech.

Finally, the court of appeals' ruling that "intermediate scrutiny" applies to the Utah Act is in conflict with this Court's decisions, which consistently apply strict scrutiny to measures comparable to the Utah Act—indeed to measures that restrict less highly protected expression. The Utah Act places a prior restraint on mailings that constitute the exercise of multiple core First Amendment rights, including not just speech on political subjects but freedom of association and the right to petition the government. At the same time, the state has far less of an interest in regulating the provision of advice outside the state than it does in regulating door-to-door solicitation, and the Court has applied strict scrutiny in cases involving door-to-door solicitation. By applying intermediate scrutiny to a statute that places a prior restraint on speech at the core of the First Amendent, without regard to the time, place, or manner of that speech, the

court of appeals acted in a way that is irreconcilable with this Court's decisions and accordingly warrants further review.

I. THE UTAH ACT IMPOSES A WHOLLY UNJUSTIFIED BURDEN ON A CENTRAL FEATURE OF THE AMERICAN SYSTEM OF FREE EXPRESSION.

1. The Utah Act violates the First Amendment rights of both ATA and the organizations it advises.[5] ATA is itself engaged in speech; it gives advice and counsel to its clients. The definition of "[p]rofessional fund raising counsel or consultant" in the Utah Act specifically refers to activities protected by the First Amendment: a fundraising consultant is "a person who * * * plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization" (Utah Code Ann. § 13-22-2 (11)(a)(i)). The fact that ATA is compensated for its work of course does not mean that its activities are unprotected. See *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964).[6]

Moreover, ATA, like many other firms in its business, itself has developed a reputation in which its public policy positions

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[5] There is no question that ATA may assert the First Amendment rights of its clients in this case. This point is settled by *Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955-59 (1984). As in *Munson*, "[t]he activity sought to be protected is at the heart of the business relationship between [ATA] and its clients, and [ATA's] interests in challenging the statute are completely consistent with the First Amendment interests of the charities it [advises]." *Id.* at 958. Indeed, because ATA is challenging the Act only insofar as it affects ATA's own activities—and is challenging the Act on its face—even the approach taken in the dissent in *Munson* would permit ATA to assert its client's First Amendment rights here. See *id.* at 979-80 (Rehnquist, J., dissenting).

[6] Any commercial implications of the relationship between ATA and its client occur either in Virginia or the District of Columbia, and those jurisdictions are amply able to regulate the commercial nature of that relationship. Since ATA does not solicit, there is no nexus—no relationship—between Utah and ATA.

are well known. It enters into contracts with clients with a particular ideological orientation, and it sees its consulting activities as a means of advancing certain public policy positions.[7] ATA's counseling and advice-giving services are, therefore, plainly protected activity under the First Amendment. See, *e.g.*, *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963); *Thomas v. Collins*, 323 U.S. 516, 531 (1945). The Utah Act's restriction on those activities accordingly can be upheld only if the state can show that the restriction promotes, at the very least, "'a subordinating interest which is compelling'" (*In re Primus*, 436 U.S. at 432, quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

In addition to its effect on ATA's own expression, the Utah Act seriously burdens the speech of the nonprofit organizations that ATA advises. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court held that "[i]t is clear" that "charitable solicitations * * * are within the protections of the First Amendment" (*id.* at 633) even when, as in *Village of Schaumburg*, the solicitations take the relatively

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[7] The founder and Chairman of ATA, Richard A. Viguerie, is generally considered to be the pioneer of political direct mail. See, *e.g.*, F. Clifton White & William J. Gill, Why Reagan Won: The Conservative Movement 1964-1981 at 53-54 (1981):

> In every election from 1966 onward, the Viguerie Company and its score of imitators and spin-off firms have played a significant role in raising money to elect conservative candidates. In so doing, they also developed into an important new component of mass media. For their fundraising letters also brought information to millions of Americans, information that quite often the people could not obtain from newspapers or television or mass circulation magazines.

The creation of political direct mail has since become common among literally tens or even hundreds of thousands of organizations of every size and every ideological stripe.

intrusive form of door-to-door canvassing. As the Court explained (*id.* at 632):

> [C]haritable appeals for funds * * * involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes * * * . [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and * * * without solicitation the flow of such information and advocacy would likely cease.

The Court has repeatedly reaffirmed these conclusions. See *Riley v. National Federation of the Blind*, 487 U.S. 781, 787-88 (1988); *Secretary of State v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 959-60 (1984).

Judicial Watch's mailings perfectly exemplify the way in which, as the Court explained in *Village of Schaumburg*, advocacy can be intertwined with solicitation. Much of each letter was devoted to advocacy about public policy matters and legal ethics, and to a description of Judicial Watch's lawsuits; those core forms of expression are inseparable from the request for a donation. See Dist. Ct. App. 229-34 (reprinting sample letters). Moreover, the conclusions that the Court reached in *Village of Schaumburg* apply far more strongly to direct mail than to in-person solicitation: direct mail is less intrusive than door-to-door solicitation; written communication provides a precise record of what the speaker said, thus greatly reducing the risk of fraud or overreaching; and, in contrast to door-to-door solicitation, the state can easily trace direct mail to the registered non-profit organization.

The Utah Act regulates ATA solely because ATA gives advice and provides services to Judicial Watch to aid it in engaging in this highly protected form of speech. This Court has consistently recognized, in a variety of contexts, that speech can be stifled by regulation that is directed in the first instance not

at the speaker but at others on whom the speaker must rely in order to make its message effective. This is the principle at the core of the landmark decision in *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Court ruled that the freedom of association is protected under the First Amendment not because the association itself was an expressive act but because, in Justice Harlan's words for the Court, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" (357 U.S. at 460).

Similarly, in *Meyer v. Grant*, 486 U.S. 414 (1988), the Court unanimously invalidated a law that forbade the use of paid solicitors to collect the signatures needed to include an initiative on the ballot. The Court noted that the "refusal to permit appellees to pay petition circulators restricts political expression * * * [by] limit[ing] the number of voices who will convey appellees' message and the hours they can speak and, therefore, limit[ing] the size of the audience they can reach." *Id.* at 422-23 (footnote omitted). The Court added that "[t]he First Amendment protects [the initiative proponents'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 424. The Court accordingly held that the restriction "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" *Id.* at 425 (citation omitted).

The unconstitutionality of the Utah Act follows *a fortiori* from *Meyer v. Grant*. While the paid solicitors in *Meyer* physically helped to propagate a message and to collect signatures, fundraising consultants help in the planning and organization of the effort to propagate a message through the mail. The role of a fundraising consultant is precisely to allow the organizations they advise "to select what they believe to be the most effective means" of "advocat[ing] their cause" (*Meyer*, 486 U.S. at 424). The Utah Act, like the Colorado law invalidated in *Meyer*, discriminates between paid and unpaid speakers. See Utah Stat. Ann. § 13-22-2(11)(a)(i). Indeed, the case for allowing the

regulation of petition solicitors—who come into direct contact with members of the public, and who have incentives to engage in impermissible conduct in order to collect more signatures—is far stronger than the case for allowing the regulation of fundraising consultants, especially those who, like ATA, have no presence in the state. And the Colorado statute was invalidated even though, unlike the Utah Act, it did not impose a licensing requirement or a prior restraint on speech.

The Utah Act is a highly selective statute; it is targeted directly on organizations that give advice to speakers engaged in core First Amendment expression, without regard to the time, place, or manner of any activity taking place within the state. A state may regulate in a way that has an incidental effect on the exercise of First Amendment rights (cf. *City of Erie v. Pap's A.M.*, No. 98-1161 (Mar. 29, 2000)), but the Utah Act cannot be defended on that ground; it directly targets the First Amendment activities of advice-giving and direct mail expression. It is in no way comparable to, for example, a general regulation of lawyers or accountants. Only organizations that give advice specifically to help make free speech more effective are subject to Utah's licensing and disclosure rules. The Utah Act then compounds the restriction on expression by placing a prior restraint on nonprofit organizations that wish to mail into Utah, merely because such organizations rely on the advice of out-of-state consultants. This cannot be squared with the First Amendment.

2. Utah not only has targeted speech for regulation; it has regulated that speech by means of a prior restraint. An organization may not solicit in Utah until its fundraising consultant has obtained a permit. Had ATA acted as a fundraising consultant without prior approval, it could have been subject to an administrative fine or even a criminal prosecution. Utah Stat. Ann. §§ 13-22-3(3), 13-22-4(1). This is a classic prior restraint. "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech * * * are the most serious and the least tolerable infringement on First Amendment rights."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Utah failed to make any showing that there is no less restrictive means of accomplishing its purported goal, or even that the Act does in fact support any legitimate state goal.[8]

Moreover, in order to obtain a permit, ATA must make extensive disclosures of information—disclosures that go to the heart of its First Amendment activities, such as information about the plans and strategies it is suggesting to its client. Such disclosures are unrelated to any legitimate state purpose. The Act itself provides no deadlines within which the Division must act on an application for a license, and although the Division has, by regulation, promulgated deadlines for itself, there is still no requirement that administrative review be concluded within a certain time or with other procedural safeguards of First Amendment rights. See Pet. App. 15a-16a.

3. The court of appeals asserted that the Utah Act is "[c]ontent neutral" and therefore "subject to 'an intermediate level of scrutiny'" (Pet. App. 3a; citation omitted). The Act is not content neutral; it applies to ATA only because of the content both of ATA's advice and of the speech of ATA's clients.

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[8] The court of appeals incorrectly relied on the plurality opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), to conclude that a prior restraint on a nonprofit organization's direct mail is acceptable. But *FW/PBS, Inc.*, dealt with a city's zoning of bookstores distributing sexually-oriented material within the city's boundaries. Clearly such a standard is inappropriate for a restriction, like the Utah Act, that reaches outside the state's borders to regulate core First Amendment expression—and that therefore must be subject to "exacting scrutiny" (*Meyer v. Grant*, 486 U.S. 414, 420 (1988)). The court of appeals also, remarkably, was willing to accept a prior restraint on the distribution of core political speech as the "status quo" applicable to a business seeking a business license in the jurisdiction in which it does business. Pet. App. 16a.

See, *e.g.*, Utah Code Ann. § 13-22-2 (1)(a), (3), (11)(a)(i). Beyond that, however, the court of appeals' decision to apply intermediate scrutiny is wholly mistaken. This Court has made it unmistakably clear that regulations like the Utah Act "'involve[] a limitation on political expression subject to exacting scrutiny.'" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988). See also *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642 (1994).[9]

The court of appeals' misapplication of this Court's precedents governing strict scrutiny in First Amendment cases itself warrants further review. But whatever the appropriate level of scrutiny, respondent and the courts below have conspicuously failed to identify *any* interest that supports the restrictions imposed on ATA. See *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 907 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden"). The court of appeals blandly stated that this Court "has indicated that registration and disclosure provisions do not raise First Amendment problems." Pet. App. 5a. But the court of appeals then cited passages from this Court's opinions in *Secretary of State v. Munson*, *supra*, and *Riley v. National Federation of the Blind*, *supra*, which referred explicitly to "fundraisers." See Pet. App. 5a, quoting *Munson*, 467 U.S. at 968 n. 16, and *Riley*, 487 U.S. at 795, 800. The district court did the same thing. Pet. App. 26a-27a.

This is an obvious, and revealing, error. ATA is indisputably not a fundraiser. Its contract specifies that it does not solicit funds, and Utah never suggested that ATA was required to obtain a permit under the extensive provisions of the Charitable

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[9] Even if the Utah Act were somehow found to be content-neutral, it places a prior restraint on core political speech rather than regulating the time, place, or manner of an activity. This is an independently sufficient reason to require strict scrutiny.

Solicitations Act that apply to professional fundraisers.[10] Whatever the justifications for reasonable regulation of individuals engaged in solicitation, there simply is no reason for Utah to require a fundraising *consultant* to seek a license and to make the extensive disclosures required by the Act. Neither the state nor the courts below ever explained why Utah cannot protect its legitimate interests by reasonable regulation of the organizations that engage in solicitation and that come into actual contact with citizens of Utah. Of course, it is conceivable that a fundraising consultant—or anyone else, anywhere in the world—could aid and abet an effort to commit a fraud against Utah citizens. But those situations can be addressed by the application of appropriate criminal and tort laws. The prior restraint imposed by Utah law is wholly unjustified and overly broad—and certainly cannot meet the heavy burden needed to sustain a substantial, prior restraint on First Amendment rights, especially those involving interstate mail.

II. THE UTAH ACT VIOLATES THE COMMERCE CLAUSE.

1. The Utah Act regulates a transaction—the contract between ATA and Judicial Watch for the provision of services—that took place outside its borders. This is a violation of the dormant Commerce Clause, even if the transaction had effects with Utah. The Commerce Clause "'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State'" (*Healy v. The Beer Institute, Inc.*, 491 U.S. 324, 336 (1989), quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion)). The Court has specifically ruled that "[f]orcing a merchant to seek regulatory approval in one State

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[10] In addition, the passages in *Munson* and *Riley*—which were, in any event, dicta—were addressed to door-to-door, in-person solicitation. As we have explained, that form of solicitation creates much greater risks of fraud and overreaching than direct mail does.

before undertaking a transaction in another directly regulates interstate commerce" in violation of the dormant Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986). This is, of course, precisely what Utah did here: it explicitly required Judicial Watch and ATA to obtain approval, in Utah, of a contract they entered and executed in Virginia.

2. The Utah Act violates the Commerce Clause for that reason alone. In addition, however, licensing and disclosure requirements like those imposed by the Utah Act necessarily limit ATA's ability to engage in interstate transactions with nonprofit organizations interested in conducting national direct mail campaigns. Those requirements also limit the ability of such organizations to communicate by mail with citizens of other states.

Direct mail is a classic form—indeed, perhaps the purest form—of interstate commerce. It would be deeply inconsistent with the idea of a federal union for a state to erect obstacles to efforts by citizens of other states to communicate with the state's citizens. The court of appeals conceded that the Utah Act's "provisions certainly burden interstate commerce for out-of-state firms like American Target." Pet. App. 18a. Accordingly, under this Court's decision in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), the question is, as this Court has said, whether the state's legitimate purposes can "be promoted as well with a lesser impact on interstate activities." *Ibid.*

The court of appeals' answer to that question is again both revealing and wholly inadequate: "In its legitimate campaign against fraudulent solicitations, the state would be severely hampered if allowed only to regulate in-state solicitors." Pet. App. 18a. ATA is, of course, not a solicitor. The question is not whether the state may regulate out-of-state firms that send solicitors into Utah. Rather, the question is why the state finds it necessary to regulate out-of-state fundraising consultants who

never come into contact with its citizens. The court below never even attempted to answer that question.[11]

Beyond that, the court of appeals' formulation is mistaken because it leaves wholly out of the picture the burdensome nature of Utah's regulation. Even if regulation with less of an impact on interstate commerce might be justifiable, Utah must show why it cannot protect its legitimate interests without *this* form of regulation—a licensing scheme coupled with a prior restraint and intrusive disclosure requirements. Unless the state can explain why the application of its basic civil, criminal, and regulatory laws is insufficient—why it must single out fund-raising consultants for an extraordinary regulatory regime—it has not justified its conceded burden on interstate commerce.

3. Finally, the Utah Act is inconsistent with this Court's decisions in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Those decisions establish that, under the Commerce Clause, a state may not require a firm to collect sales taxes or use taxes when the firm's only contact with state residents is by mail or common carrier. See *Quill Corp.*, 504 U.S. at 314-18. These decisions therefore raise serious questions about whether a state may (without congressional authorization) impose regulatory requirements on direct mail solicitors—whose nexus or degree of contact with the state is, if anything, less than that of the firms that *Quill Corp.* exempted from taxation. As in *Quill*, the Court should consider "the effects of state regulation on the national economy" (*id.* at 312)—which would involve the impact not only of the Utah Act but the potential (which is not only real but growing) of 50 states and 6000 local jurisdictions creating similar barriers. See, *e.g.*, *American Charities*

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[11] In addition, as ATA repeatedly pointed out below, there are numerous existing laws that provide effective means for Utah and its citizens to protect against fraud. See Dist. Ct. App. 53-56, 508.

v. Pinellas County, 32 F.Supp.2d 1308 (M.D. Fla. 1998), on appeal, No. 99-10945A (11th Cir.).

In any event, however, fundraising consultants like ATA have no contact with Utah residents whatever—by mail or otherwise. If even firms that have contact by mail with Utah residents may not be required to collect sales and use taxes, then necessarily a firm that, like ATA, does not even have that form of contact may not be subject to a license and highly burdensome prior restraint on speech.

III. THE COURT OF APPEALS' DECISION UPHOLDING THE UTAH ACT ERRONEOUSLY RESOLVES AN IMPORTANT AND UNSETTLED ISSUE UNDER THE DUE PROCESS CLAUSE.

It is well established that the Due Process Clause limits a state's power to apply its laws to entities and transactions with which it has an insufficient connection. See, *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); *Home Insurance Co. v. Dick*, 281 U.S. 397, 407-11 (1930). Here, Utah seeks to impose an intrusive regulatory regime on ATA—a Virginia corporation that does no business in Utah, that has (as the state stipulated) no "offices, employees, directors, agents, bank accounts or real property in Utah" (Dist. Ct. App. 227), and that has no commercial relations with any Utah firm. Utah seeks to impose this regulatory regime on ATA because ATA entered a contract with Judicial Watch, a nonprofit corporation located in Washington, D.C. (*ibid.*). This licensing scheme is imposed merely by virtue of Judicial Watch's mailing letters into Utah.

Unlike a legitimate business licensing law, the Utah Act regulates an out-of-state entity that provides out-of-state services to another out-of-state entity—and the trigger for regulation is that those entitities engage in core political activities protected by the First Amendment. This is not a case of a state regulating

professional advice given within the state's boundaries or given with respect to an individual state's laws. It is advice about public policy communications mailed nationally, irrespective of any given state.

The court of appeals ruled that the requirements of the Due Process Clause were nonetheless satisfied because ATA "purposefully direct[ed] efforts toward residents of" Utah. Pet. App. 20a. But the court of appeals derived this standard from cases addressing the Due Process Clause limits on a state's power to assert personal jurisdiction over litigants in its courts. See *id.* at 19a-20a, citing *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985). The court of appeals then concluded, in cursory fashion, that ATA's putative relationship with Utah would necessarily give the state the power to subject ATA to legislative regulation too. See Pet. App. 20a.

The court of appeals' conflation of "adjudicative" and "legislative" jurisdiction, for Due Process purposes, is an egregious expansion of regulatory authority that raises a fundamental and important question requiring this Court's review. The Court has never fully clarified the relationship between these two ways in which a state may assert jurisdiction over a foreign person or entity. Indeed, three members of the Court have recently made a point of emphasizing that "the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are [not] necessarily identical" (*Quill Corp.*, 504 U.S. at 319-20 (Scalia, J., concurring)). The court of appeals' mistaken treatment of this important question merits this Court's review.

Because of the basic constitutional issues at stake, and because of the enormous practical impact of the decision of the court of appeals on the millions of citizens who receive important information and communications through direct mail, the Court should review the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

[Filed Jan. 13, 2000]

UNITED STATES COURT OF APPEALS,

Tenth Circuit

No. 98-4158.

AMERICAN TARGET ADVERTISING INC.,
a Virginia corporation,
Plaintiff-Appellant,

v.

FRANCINE A. GIANI, in her official capacity as Division.
Director of the Utah Division of Consumer Protection,
Department of Commerce for the State of Utah,
Defendant-Appellee.

Bruce W. Eberle & Associates, Inc.;
Free Speech Defense and Education Fund, Inc.,
Mike Hatch, Minnesota Attorney General, et al.,
Amici Curiae.

Before TACHA, HOLLOWAY, and BALDOCK, Circuit Judges.

TACHA, Circuit Judge.

American Target filed this suit against Francine A. Giani in her official capacity as Director of the Utah Division of Consumer Protection. American Target sought declaratory, injunctive, and other relief, asking the district court to hold the Utah Charitable Solicitations Act unconstitutional. On cross motions for summary judgment, the district court granted

summary judgment in favor of defendant. American Target filed a timely appeal, and we exercise jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

I. BACKGROUND

American Target is a Virginia corporation that provides fundraising services to nonprofit organizations. The corporation is under contract to provide such services to Judicial Watch, Inc., a nonprofit organization located in Washington, D.C. Under this contract, American Target helps manage Judicial Watch's national direct mail campaign.

By virtue of its contract with Judicial Watch, American Target is classified as a professional fundraising consultant under the Utah Charitable Solicitations Act. Utah Code Ann. § 13-22-2(11) (Supp.1999). The Act requires all professional fundraising consultants to register with the state and obtain a permit. *Id.* §§ 13-22-5,-9. To obtain the required permit, American Target must complete a written application, pay an annual fee of $250 and post a bond or letter of credit in the amount of $25,000. *Id.* § 13-22-9.

American Target has not complied with the registration requirements and is therefore barred from assisting Judicial Watch with its mailing in Utah. American Target claims that the Act violates several provisions of the U.S. Constitution, including the First Amendment, the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. We address each constitutional challenge.

II. FIRST AMENDMENT

The First Amendment provides that government "shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. In a facial challenge, American Target argues that the Utah Act operates both as an impermissible abridgement of protected speech and as an unconstitutional prior restraint. Because nothing in the record indicates that the Act will have

any different impact upon interests not before this court, we analyze both prongs of the First Amendment challenge as they are presented under the facts of this case. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801-02, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). If any provision should fail as applied to American Target, we will then decide if the provision is unconstitutional on its face. To find a provision facially unconstitutional, we must conclude that "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Id.* at 797,104 S.Ct. 2118.

A. *Protected Speech*

We review de novo challenges to the constitutionality of a statute. *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir.1996). In addition, where expressive activity is arguably protected by the First Amendment, this court must make an independent examination of the entire record. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). After such review, we conclude that all but three of the challenged provisions are consistent with the First Amendment.

Charitable solicitations qualify as protected speech for First Amendment purposes. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). Content neutral regulation of protected speech is subject to "an intermediate level of scrutiny." *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). A measure designed not to "suppress the expression of unpopular views" but rather to control the "secondary" effects of speech will generally be deemed content

neutral. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Utah Act targets the secondary effects of professional solicitations, i.e., increased fraud and misrepresentation. The Act does not authorize a content-based review of the charitable mailings. It simply facilitates oversight of the mailers' backgrounds and methods. Therefore, the Act is content neutral, and we accordingly subject it to intermediate scrutiny. The state must demonstrate that the Act (1) serves a substantial governmental interest and (2) is "narrowly drawn" to serve that interest "without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg*, 444 U.S. at 636-37, 100 S.Ct. 826. [1]

"The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 792, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). The stated purpose of the Utah Act is "to protect . . . citizens from harmful and injurious acts." Utah Code Ann. § 13- 1-1 (1996). The registration and permit provisions require applicants to make detailed disclosure about past activities, including descriptions of any injunction, judgment or administrative order entered against them. Utah Code Ann. § 13-22-9 (Supp.1999). The grounds for denying a permit center on findings of fraud and misrepresentation. *Id.*

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[1] American Target contends that we should apply intermediate scrutiny to this content neutral regulation only if we first determine that it is a time, place or manner restriction. The *Turner Broadcasting* court made no such qualification and we shall not impose one here. In fact, the Supreme Court has suggested that there is no meaningful distinction between evaluation of a content neutral regulation of expressive conduct and a content neutral time, place or manner restriction. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (observing that the test applied to expressive conduct "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions").

§ 13-22-12. The Act's general declarations and specific prohibitions clearly target fraud. The Act therefore serves a substantial government interest.

All of the Act's provisions must be narrowly drawn to serve this recognized governmental purpose. We review those statutory provisions construed by the district court to determine whether the state has narrowly tailored them to prevent fraud.

1. Registration and Disclosure Requirements

The Act requires professional fundraising consultants like American Target to meet certain registration and disclosure requirements. Consultants must identify those involved in the solicitation process, disclose the purpose and method of solicitation, declare the existence of any injunctions, judgments, administrative orders, or criminal convictions involving moral turpitude, and provide copies of all agreements concerning fundraising. *Id.* § 13-22-9.

The Supreme Court has indicated that registration and disclosure provisions do not raise First Amendment problems. In *Secretary of State v. Munson*, 467 U.S. 947, 968 n. 16, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), the Court recognized that "concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct." In *Riley*, the Court stressed that the state "may constitutionally require fundraisers to disclose certain financial information." *Riley*, 487 U.S. at 795, 108 S.Ct. 2667. The *Riley* court further found that "the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file." *Id.* at 800, 108 S.Ct. 2667.

Mandatory registration and disclosure enable Utah citizens to make informed decisions concerning their charitable donations. These requirements directly promote Utah's legitimate

interest in combating fraud while not unnecessarily interfering with solicitors' protected speech. We find that the registration and disclosure provisions of the Utah Act are narrowly tailored to serve the state's substantial interest in fighting fraud.

2. Registration Fee

The Utah Act also requires fundraising consultants to pay an annual registration fee. The fee imposed must be "reasonable, fair and reflect the cost of services provided." Utah Code Ann. § 63-38-3.2(2)(a) (Supp.1999); Utah Code Ann. §13-22-9(1)(a) (Supp.1999). Prior to fiscal year 1997, the state assessed a fee of $150. The Utah Division of Consumer Protection raised the fee to $250 for fiscal year 1997 and thereafter. In an affidavit filed with the district court, Director Giani stated that the Division raised the fee to defray increased regulatory costs caused by a significant jump in applications.

Arguing that the $250 fee is excessive, American Target relies almost exclusively upon *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). In *Murdock*, the Supreme Court struck a city ordinance that, as applied, required Jehovah's Witnesses to pay a license tax to engage in door-to-door solicitation. The Court declared that "[f]reedom of speech . . . [should be] available to all, not merely to those who can pay their own way." *Id.* at 111, 63 S.Ct. 870. The Court recognized some limits to this principle, however. Cataloguing the failings of the license tax at issue, the Court observed that it was not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 113-14, 63 S.Ct. 870. The Court observed that "[t]he constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized." *Id.* at 115 n. 8, 63 S.Ct. 870.

Murdock "does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally

permissible." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Rather, a regulatory fee may be constitutional only if it serves a "legitimate state interest." *Id.* The state of Utah, through the Giani affidavit, adequately connects the $250 regulatory fee to the state's recognized interest in protecting its citizenry from fraud. The fee does no more than defray reasonable administration costs. We therefore find the fee narrowly tailored to the identified interest.

3. Bond or Letter of Credit

To obtain a permit under the Act, American Target must also provide proof that it is bonded or provide a letter of credit in the amount of at least $25,000. Utah Code Ann. § 13-22-9(4)(a). The statute requires that the bond or letter of credit "be payable to the state for the benefit of parties who may be damaged by any violation of this chapter." *Id.* § 13-22-9(4)(b).

The district court relied upon *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474 (6th Cir. 1995), to uphold the bonding provision. In *Dayton Area*, the Sixth Circuit affirmed a district court's holding that a $25,000 surety bond requirement under the Ohio Charitable Solicitations Act was narrowly tailored to serve a legitimate state interest. *Id.* at 1486. Significantly, the *Dayton Area* court reviewed a district court's partial grant and partial denial of a preliminary injunction. This procedural posture limited the nature of the First Amendment analysis and limited the court to an abuse of discretion review. In our de novo review, we must decide as a matter of law whether the $25,000 bond is narrowly tailored to the identified state interest. *Dayton Area* is therefore inapposite.

The bond requirement, on its face, supports a different state interest than the other challenged provisions of the Act. The disclosure and fee requirements enable prophylactic oversight

of professional fundraisers. The bond requirement provides a victim relief fund for those injured through violations of the Act. When a professional fundraiser violates the Act, the state naturally expects the violator to satisfy a tort judgment. But this interest in redress applies across the law in other tort contexts. More importantly, this interest is adequately served by the preventive measures within the Act. Extensive disclosure and vigorous oversight diminish the likely need for a victim compensation fund. An ounce of prevention here is preferable to a pound of cure.

The actual impact of the bond requirement supports our conclusions. The president of American Target, in a sworn affidavit, stated that the company must provide 100 percent collateral for the amount of any outstanding bond. The company does not have enough unpledged collateral on hand to secure the Utah bond and must borrow the full amount. *Id.* The requirement therefore imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. Bonding may peripherally promote Utah's interest in regulatory oversight, but this goal is "sufficiently served by measures less destructive of First Amendment interests." *Village of Schaumburg,* 444 U.S. at 636, 100 S.Ct. 826. Through the registration, disclosure and fee requirements, the statute provides less intrusive means of fraud prevention. The chilling financial reality of the bond "unnecessarily interfer[es] with First Amendment freedoms," *id.* at 637, 100 S.Ct. 826 and is therefore unconstitutional as applied.

Having found the bond provision unconstitutional as applied to American Target, we now must decide whether any attempt to enforce this provision would create "an unacceptable risk of the suppression of ideas." *Taxpayers for Vincent,* 466 U.S. at 797, 104 S.Ct. 2118. We find that it would. There is evidence in the record that qualifying for a letter of credit is much like qualifying for a loan. While some consultants may qualify for the required letter without 100 percent collateral, this possibility does not save the provision. We are not pre-

pared to allow the constitutionality of this requirement [to] turn on the applicant's credit rating. Furthermore, any posted collateral would go to support victim recovery. We have already found that the guarantee of victim relief only peripherally supports the recognized state interest in regulatory oversight. The chilling impact of the bond upon protected speech outweighs any fraud protection it might provide. We therefore find that the bond/letter of credit provision of the Utah Act is unconstitutional on its face.

B. *Severability*

Having found one part of the Act unconstitutional, we must decide whether the objectionable provision can be severed. Severability is an issue of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (per curiam). In Utah, the test is "whether the legislature would have passed the statute without the objectionable part. . . . Frequently the courts are aided in the determination of legislative intent by the inclusion within a statute of a 'saving clause.' " *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 779 (Utah 1994) (quoting *Union Trust Co. v. Simmons*, 116 Utah 422, 211 P.2d 190, 193 (1949)).

There is no saving clause in the Utah Act to aid our interpretation. Therefore, we must look to whether the statutory provisions "are so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety." *Id.* The bonding/letter of credit requirement is not interrelated in any meaningful sense with the remainder of the Act. Indeed, on its face, the bonding requirement articulates a different purpose than do the other provisions. Elimination of the bonding requirement therefore will not frustrate the Act's stated purpose. Accordingly, we find that it is severable under Utah law.

C. *Prior Restraint*

American Target also claims that the Act operates as an impermissible prior restraint upon protected speech. A

scheme of prior restraint gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). American Target is barred from aiding any solicitations within the state until it complies with all the Act's requirements. Utah Code Ann. § 13-22-6(1)(b)(xiv)(B) (Supp.1999). The Act therefore definitionally qualifies as a prior restraint. Because we have struck the bonding requirement, we consider only whether the other challenged provisions establish an unconstitutional prior restraint. [2]

"Prior restraints are not unconstitutional per se." *Southeastern Promotions*, 420 U.S. at 558, 95 S.Ct. 1239. However, "[a]ny system of prior restraint ... comes to [the] Court bearing a heavy presumption against its constitutional validity." *Id.* (internal quotation marks and citation omitted). In particular, there are "two evils" that will not be tolerated in such schemes. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). First, no system of prior restraint may place " 'unbridled discretion in the hands of a government official or agency.' " *Id.* (quoting *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)). Second, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id.* at 226, 110 S.Ct. 596.

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[2] Much of the prior restraint law developed in the context of ordinary licensing and zoning schemes. None of the schemes we encountered carried a restraint like the bonding requirement under the Utah Act. Having already found that requirement an unconstitutional burden upon free speech, we do not address how such a restraint would affect our analysis here. We simply note that so substantial a bonding requirement might operate as a full restraint where applicants cannot muster the required collateral.

1. Unbridled Discretion

a) § 13-22-9(1)(b)(xiv)

American Target contends that state officials enjoy too much discretion over the administrative process. The Director of the Division of Consumer Protection has the power to deny, suspend or revoke an application, registration, permit or information card. Utah Code Ann. § 13-22-12(1). To exercise this power, the director must find that such action serves the "public interest" and that the regulated entity has violated one or more of thirteen grounds set forth in the statute. *Id.*[3] These

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[3] Section 13-22-12(1) provides in full:

(1) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to deny, suspend, or revoke an application, registration, permit, or information card, upon a finding that the order is in the public interest and that:

(a) the application for registration or renewal is incomplete or misleading in any material respect;

(b) the applicant or registrant or any officer, director, agent, or employee of the applicant or registrant has:

(i) violated this chapter or committed any of the prohibited acts and practices described in this chapter;

(ii) been enjoined by any court, or is the subject of an administrative order issued in this or another state, if the injunction or order includes a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or if the injunction or order was based on a finding of lack of integrity, truthfulness, or mental competence of the applicant;

(iii) been convicted of a crime involving moral turpitude;

(iv) obtained or attempted to obtain a registration or a permit by misrepresentation;

(v) materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation;

(vi) caused or allowed any paid solicitor to violate any rule made or order issued under this chapter by the division;

(vii) failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fund raising counsels or consultants;

(viii) used, or attempted to use a name that either is deceptively

grounds include, among others, the filing of an application that is "incomplete or misleading in any material respect." *Id.* § 13-22-1 2(i)(a). The Act also contains a list of specific information which must be included in any application. *Id.* §13-22-9.[4] The director retains the authority to request "any

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similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names;

(ix) failed to timely file with the division any report required in this chapter or by rules made under this chapter; or

(x) failed to pay a fine imposed by the division in accordance with Section 13-22-3;

(c) a professional fund raiser or professional fund raising counselor or consultant does not have a bond or letter of credit in force as required by Subsection 13-22-9(4); or

(d) the applicant for registration or renewal has no charitable purpose.

[4] Section 13-22-9 provides, in relevant part:

(1) It is unlawful for any person or entity to act as a professional fund raiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division by complying with all of the following application requirements:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division that includes:

(i) the applicant's name, address, telephone number, facsimile number, if any;

(ii) the name and address of any organization or person controlled by, controlling, or affiliated with the applicant;

(iii) the applicant's business, occupation, or employment for the three-year period immediately preceding the date of the application;

(ix) disclosure of any injunction, judgment, or administrative order against the applicant or the applicant's conviction of any crime involving moral turpitude;

(x) a copy of any written agreements with any charitable organization;

(xi) the disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or

additIonal information the division may require." *Id.* § 13-22-9(1)(b)(xiv). American Target contends that this catch-all provision confers unbridled discretion upon the director: she may demand any piece of information from an applicant and lawfully deny a permit if the applicant refuses such request. We agree.

The state may not condition protected speech "upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958). " '[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.' " *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)).

In a facial challenge to a city licensing scheme, the Supreme Court considered a catch-all provision that authorized the imposition of "other terms and conditions deemed necessary and reasonable by the Mayor." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 754 & n. 2, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (internal quotation marks and citation omitted). The Court held that this section of the statute was unconstitutional on its face because it presumed that the

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principal of the applicant;

(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds;

(xiii) an acknowledgment that fund raising in the state will not commence until both the professional fund raiser or professional fund raising counsel or consultant and the charity, its parent foundation, if any, are registered and in compliance with this chapter; and

(xiv) any additional information the division may require.

mayor would "act in good faith and adhere to standards absent from the ordinance's face." *Id.* at 770, 108 S.Ct. 2138. "The doctrine [forbidding unbridled discretion] requires that the limits the city claims are implicit in its law be made explicit by textual incorporation." *Id.* Like the catch-all provision in *City of Lakewood*, §13-22-9(1)(b)(xiv) confers unconstitutional discretion on the director because it presumes that she will use her blanket authority to request additional information only in good faith and consistent with implicit standards. As a result, §13-22-9(1)(b)(xiv) threatens to overwhelm the narrow and objective provisions that precede it. *Cf. Beal v. Stern*, 184 F.3d 117, 126 n. 6 (2d Cir.1999) ("The existence of standards does not in itself preclude a finding of unbridled discretion, for the existence of discretion may turn on the looseness of the standards or the existence of a condition that effectively renders the standards meaningless as to some or all persons subject to the prior restraint.").

We therefore hold that § 13-22-9(1)(b)(xiv), construed in light of the director's authority to deny an incomplete application, is unconstitutional on its face and we sever it from the Act. [5] Any attempt by the state to invoke this blanket authority "would create an unacceptable risk of the suppression of ideas." *Taxpayers for Vincent*, 466 U.S. at 797, 104 S.Ct. 2118.

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[5] Utah law on severability, see supra Part II.B., requires us to sever this unconstitutional provision. We must decide "whether the remaining sections [of the statute], standing alone, will further the legislative purpose." *Stewart*, 885 P.2d at 779. The remaining provisions mandate disclosure of an applicant's biographical, financial and criminal background along with copies of relevant agreements. This disclosure enables the state oversight necessary to achieve the Act's stated purpose of "protect[ing] . . . citizens from harmful and injurious acts." Utah Code Ann. § 13-1-1.

b) § 13-22-12(1)(b)(vii)

Section 13-22-12(1)(b)(vii) authorizes the state to deny a permit if the applicant has "failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fundraising counsels or consultants." Instead of providing "narrow, objective and definite standards to guide the director," *Shuttlesworth*, 394 U.S. at 150-51, 89 S.Ct. 935 this provision imposes a vague requirement: the applicant must "reasonably supervise" its agents and employees. Nowhere does the statute define or limit the nature of such supervision. "Imprecise language may vest authorities with the discretion to determine which groups and individuals are entitled to exercise First Amendment rights." *Association of Community Orgs. for Reform Now v. Municipality of Golden*, 744 F.2d 739, 747 (10th Cir. 1984).

Given the placement of this provision within the statutory text, we can only speculate as to a limiting construction. Perhaps the provision is designed to merely punish the applicant if an agent or employee violates the Act under his failed supervision. However, we decline to read words into the statute that the Utah Legislature did not ratify. The state must make explicit the necessary limits to the director's discretion. As enacted, § 13-22-12(i)(b)(vii) also confers unbridled discretion on the state and therefore is unconstitutional on its face.[6]

2. Time Limits

Time limits upon a prior restraint allay "the risk of indefinitely suppressing permissible speech." FW/PBS, 493 U.S. at 227, 110 S.Ct. 596. In evaluating a facial challenge to a state act, we must consider the state's own construction of the act, including its implementation and interpretation. *Forsyth*

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[6] Based on the foregoing analysis of severability, we also find this provision severable from the statute as a whole

County, 505 U.S. at 131, 112 S.Ct. 2395 (1992). The State, by regulation, requires that all initial applications and renewals of registration be processed within ten days of their receipt by the Division of Consumer Protection. Utah Admin. Code R152-22-3(4) (WESTLAW through July 1999). American Target claims that the ten-day delay for administrative processing is unconstitutionally lengthy.

In *Freedman v. Maryland*, 380 U.S. 51, 58-60, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court held that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained.[7] Here the restraint imposed prior to judicial review is both clearly specified and brief. Upon denial of an initial or renewal application, the applicant is entitled to an administrative determinations must then be issued with five business days of the hearing. *Id.*

In addition, the state maintains the status quo during administrative review. The status quo for a new applicant like

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[7] The *Freedman* court also found that prompt judicial review must be available and that the licensor must bear the burden in court to suppress the protected speech. *Freedman*, 380 U.S. at 58-59, 85 S.Ct. 734; *see also* FW/PBS, 493 U.S. at 227, 110 S.Ct. 596 (summarizing the *Freedman* factors).

The modern interpretation of these *Freedman* safeguards has provoked some confusion among the circuits. *See, e.g., Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir.1998) (summarizing the circuit split over the meaning of prompt judicial review); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 996 n. 12 (4th Cir.1995) (en banc) (concluding that the splintered opinions in *FW/PBS* leave the burden of proof safeguard "subject to some speculation"). In its briefs, American Target makes only stray references to the Act's impact on judicial relief. We find such references insufficient to trigger appellate review and therefore do not address the scope of judicial relief necessary under *Freedman*. *See Murrell v. Shalala*, 43 F.3d 1388, 1390 n. 2 (10th Cir.1994) (finding that a "few scattered statements" in plaintiff's argument "fail[ed] to frame and develop an issue sufficient to invoke appellate review").

American Target is non-operation. *See East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir.1995) (status quo for business seeking permit is non-operation); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir.1994) (applicant not free to operate while license is pending). Thus, Utah's restraint of American Target during the brief period of administrative review is constitutional.

III. COMMERCE CLAUSE

American Target also claims that the Act as applied places an undue burden upon interstate commerce. We disagree. We review American Target's Commerce Clause challenge de novo. *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir.1996). The Commerce Clause not only empowers Congress to "regulate Commerce . . . among the several States," U.S. Const. art I, § 8, cl. 3, but also "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," *Oregon Waste Sys. v. Dep 't of Envtl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed..2d 13 (1994). This implied restraint upon the states is often referred to as the negative or "dormant" aspect of the Commerce Clause.

To evaluate a dormant Commerce Clause challenge, this court must first determine whether the act in question "regulates evenhandedly" among economic interests or instead "discriminates against interstate commerce" either on its face or in practical effect. *Oregon Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345 (quoting *Hughes V. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979)). Discrimination in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The Utah Act plainly does not distinguish between in-state and out-of-state businesses. American Target's status as a Virginia corporation doing business in Utah is legally irrelevant. It is American Target's status under the Act as a professional fundraising consultant that triggers

the licensing requirements.

Because the Act regulates evenhandedly among in-state and out-of-state consultants, this court must balance various interests in the constitutional assessment. The Act must be upheld if it serves a "legitimate public interest," its effects on interstate commerce are only "incidental," and the burden imposed on interstate commerce is not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The party challenging a statute that regulates evenhandedly bears the burden of proving the statute's excess. *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir.1992).

As discussed previously, the Supreme Court has recognized the public interest in curtailing fraudulent solicitations. *Riley*, 487 U.S. at 792, 108 S.Ct. 2667; *Village of Schaumburg*, 444 U.S. at 637, 100 S.Ct. 826. Because we have found that the bond is an unconstitutional burden upon free speech, the $250 fee, along with the registration and disclosure requirements, remain for our consideration. Since the Act applies to all fundraising consultants who operate within Utah, its provisions certainly burden interstate commerce for out-of-state firms like American Target. However, the burden is minimal. Thus, we must consider whether the identified public purpose could 'be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. In its legitimate campaign against fraudulent solicitations, the state would be severely hampered if allowed only to regulate in-state solicitors. Therefore, we find that the burdens the Act imposes on interstate commerce are incidental and not clearly excessive in relation to the legitimate public interest.

American Target contends that another line of Commerce Clause authority applies to this case. Citing *National Bellas Hess, Inc., v. Department of Revenue*, 386 U.S. 753, 87 S.Ct, 1389, 18 U Ed.2d 505 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), American Target identifies a bright-line rule prohibiting the regulation of interstate commerce where the regulated entity's

only connection to the state is by common carrier or the U.S. mails. Both *Bellas Hess* and *Quill* concern the levy of taxes upon out-of-state entities. The Supreme Court in *Quill* repeatedly stressed that it was preserving *Bellas Hess'* bright- line rule "in the area of sales and use taxes." *Quill,* 504 U.S. at 316, 112 S.Ct. 1904; *see also id.* at 311, 112 S.Ct. 1904 ("*Bellas Hess* . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."); *id.* at 317, 112 S.Ct. 1904 ("[O]ur reasoning . . . does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes."). The Utah Act imposes licensing and registration requirements, not tax burdens. The *Bellas Hess / Quill* bright-line rule is therefore inapposite.

IV. DUE PROCESS

Finally, American Target submits that the Utah Act as applied confers state jurisdiction in a manner inconsistent with due process. Again, we disagree.

The Due Process Clause of the Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. Judicial jurisdiction cannot extend to an individual consistent with due process unless "he have certain minimum contacts [with the jurisdiction] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). The Supreme Court has tailored this jurisdictional principle to the corporate context. "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King v. Rudzewicz,* 471 U.S. 462, 476, 105

S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *Keeton v. Hustler Magazine,. Inc.*, 465 U.S. 770, 774-75, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)).

In its agreement with Judicial Watch, American Target promises to suggest lists of potential Utah donors, design targeted mailings, help select optimum dates for mailing, and act as a general consultant concerning the solicitation process. To fulfill its obligations under this agreement, American Target must purposefully direct efforts toward residents of the state. Therefore, jurisdiction can be asserted consistent with due process.

Without apparent authority, American Target claims that there must be a higher level of business activity to support the legislative or regulatory jurisdiction asserted here. Charting the due process limits on legislative jurisdiction, the Supreme Court has employed language reminiscent of that used in the personal jurisdiction caselaw. "There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction." *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 315 n. 2, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) (Harlan, J., dissenting). *See generally Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir.1999) (concluding that "although not identical, judicial and legislative jurisdiction are determined pursuant to like guidelines"). If there is a distinction to be drawn between the two inquiries, it is not one necessary to the disposition of this matter. American Target has sufficiently satisfied either formulation of minimum contacts to support Utah's assertion of regulatory jurisdiction.

For the reasons discussed above, we AFFIRM in part and REVERSE in part. In addition, we deny the outstanding motion by Appellant American Target to strike the brief of amici curiae Mike Hatch, Minnesota Attorney General, et al., and grant the motion for leave to respond.

APPENDIX B

[Filed: Aug. 19, 1998.]

UNITED STATES DISTRICT COURT,
D. UTAH, CENTRAL DIVISION

No. 2:97CV610 B.

AMERICAN TARGET ADVERTISING INC.,
a Virginia Corporation,
Plaintiff,

v.

FRANCINE A. GIANI, in her official capacity as Division.
Director of the Utah Division of Consumer Protection,
Department of Commerce for the State of Utah,
Defendant.

MEMORANDUM OPINION AND ORDER

BENSON, District Judge.

Plaintiff American Target Advertising, Inc., a Virginia corporation, is a political consulting firm specializing in political fund-raising. American Target filed this lawsuit against Defendant Francine Giani in her official capacity as Director of the Division of Consumer Protection of the Utah Department of Commerce, seeking to enjoin Utah's enforcement of the Utah Charitable Solicitations Act, codified at Utah Code Ann. § 13-22-1 *et seq.*

Cross-Motions for Summary Judgment are before the Court.

I. BACKGROUND

A. The Statute

The Utah Charitable Solicitations Act (the Act), codified at Utah Code Ann. §13-22-1 *et seq.*, establishes a regulatory system for licensing out-of-state professional fund-raising consultants. Under the Act, fund-raising consultants must (1) apply for a license from the state, (2) make financial disclosures to the Utah Division of Consumer Protection, (3) pay a $250 annual registration fee, and (4) secure a $25,000 bond or letter of credit before their clients can solicit contributions in Utah.

After the State has received an application from an out-of-state fund-raising consultant, the Division has ten business days within which to approve or deny the application. Utah Admin.Code R152-22-4(3). The application may be denied or revoked if such action is in the public interest *and* upon a finding that (1) the application for registration or renewal is incomplete or misleading in any material respect; (2) the applicant has violated the Act or failed to pay a fine imposed under the Act, (3) the applicant has been convicted of a crime involving moral turpitude; (4) an injunction or administrative order has been entered against the applicant in which there was a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or where the injunction or order was based on a finding of lack of integrity, dishonesty, or mental incompetence of the applicant; (5) the consultant has materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation; (6) the consultant has failed reasonably to supervise its agents or employees, (7) the consultant has used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names; or (8) the consultant has failed to secure and/or maintain a $25,000 bond or letter of credit. Utah Code Ann. § 13-22-12.

Those who violate the Act are subject to administrative, civil, or criminal enforcement action. The Director may initiate administrative action to (1) suspend or revoke the registration, (2) order that the consultant cease and desist from its unlawful conduct, or (3) impose an administrative fine. Utah Code Ann, §§ 13-2-3, 6,12. Any such action is subject to provisions of the Administrative Procedures Act, Utah Code Ann. § 63-46b-1 *et seq.*, which guarantees the consultant's right to notice and a hearing.

The Division may also seek damages, civil penalties, and injunctive relief in state district court. Utah Code Ann. § 13-22-3. Any civil judgment rendered or administrative fine imposed against a consultant for violating the Act may be recovered from the bond or letter of credit posted by the consultant. Utah Admin. Code R152-22-6 (1996). Any fine or civil penalty imposed must be excused unless it appears, by a preponderance of the evidence, that the consultant acted in bad faith or with intent to harm the public. Utah Code Ann. § 13-22-3(5).

B. *Events Leading to this Lawsuit*

Plaintiff American Target Advertising, Inc. is a Virginia corporation that provides fund-raising services to nonprofit organizations. On behalf of its clients, American Target uses direct mail to solicit funds from the general public. American Target was retained by Judicial Watch, a nonprofit "political watchdog" organization incorporated in the District of Columbia, to plan, manage, and prepare materials relating to Judicial Watch's nationwide information distribution and fund-raising program.

In February, 1997, Judicial Watch applied for a fund-raising license with the Utah Division of Consumer Protection. The Division informed Judicial Watch that it would be ineligible for a license unless (a) American Target registered with the Division, (b) Judicial Watch agreed not to pay

American Target for its fund-raising consulting services, or (c) Judicial Watch agreed not to use American Target's services in connection with Judicial Watch's fund-raising activities in Utah.

Three months later, the Division granted Judicial Watch a fund-raising license. However, the Division made clear that the issuance of the permit was contingent upon Judicial Watch's promise not to use the services of any professional fund-raising consultant not licensed in Utah in connection with [its] fund-raising activities in Utah.

American Target then filed this lawsuit, claiming that the Utah Charitable Solicitations Act is unconstitutional under the First Amendment, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment. After filing the Complaint, American Target filed a Motion for a Preliminary Injunction. Defendant agreed to the entry of an Order suspending enforcement of the Act with respect to American Target and Judicial Watch during the pendency of this lawsuit. American Target then filed a Motion for Summary Judgment. Defendant opposed that Motion and filed her own Motion for Summary Judgment.

The parties have conducted limited discovery, having taken the depositions of James E. B. Carney, Vice President of American Target, and Francine A. Giani, Director of the Utah Division of Consumer Protection. The parties have filed a Stipulation of Facts, setting forth facts as to which there is no dispute.

II. DISCUSSION

A. *Constitutionality Under the First Amendment*

It is beyond dispute that any law that restricts charitable solicitations is subject to First Amendment scrutiny. As the Supreme Court noted in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d

73 (1980), charitable solicitations "involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Id.* at 632, 100 S.Ct. 826.

However, it is equally well-settled that "[s]oliciting financial support is ... subject to reasonable regulation." *Id.* at 632, 100 S.Ct. 826. In order to survive a First Amendment challenge, a law that regulates charitable solicitations must (1) serve a substantial governmental interest, and (2) be "narrowly drawn . . . to serve th[at] interest[] without unnecessarily interfering with First Amendment freedoms." *Id.* at 637, 100 S.Ct. 826. *See also, Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 961, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 792, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

1. Substantial Interest

First, the Court must determine whether Utah's interest in enacting the legislation is substantial. The State's interest will be deemed substantial if the statute was enacted to " 'protect[] the public from fraud, crime, and undue annoyance.' " *Village of Schaumburg*, 444 U.S. at 635, 100 S.Ct. 826.

The stated purpose of the Act is "to protect [Utah] citizens from harmful and injurious acts." Utah Code Ann. § 13-1-1. The Act seeks to fulfill this purpose by (1) preventing fraud and (2) providing a means of redress for victims of fraud.

It is undisputed that these interests are substantial, and based in part on past experience with persons who have used charitable fund-raising activities as vehicles for fraud. The Supreme Court has held that "[t]he interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Riley v. National Federation of the Blind*, 487 U.S. 781, 792, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

2. Narrow Tailoring

The second prong of the test requires the Court to determine whether the Act is narrowly tailored. Under this standard, the challenged statute need not constitute the "least restrictive means" of obtaining the legislative objective. *See e.g., Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 961, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). In clarifying this standard, the Supreme Court has held that a law is narrowly tailored if it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

American Target argues that four aspects of the Act fail under the narrow tailoring requirement: (1) the registration and disclosure requirement; (2) the registration fee; (3) the bond or letter of credit requirement; and (4) the allegedly overbroad discretion of the Director of the Division of Consumer Protection.

a. The Registration & Disclosure Requirement

The Act requires fund-raising consultants such as American Target to provide the Division with information about the consultant and its relationship with the charity it consults. The Act also requires the consultant to disclose the nature of any law enforcement actions taken against the consultant, its operators, principals, directors, officers, or managers. Utah Code Ann. § 13-22-9. Consumers may access this information from the State to verify representations made in solicitations and to assess the reliability and trustworthiness of those who participate in the solicitation process.

The Utah Act's registration and disclosure requirements appear to be consistent with the provisions upheld in *Riley v. Federation of the Blind of North Carolina*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). In that case, the Court declared several provisions of North Carolina's charitable

solicitations law unconstitutional, but explained that "North Carolina may constitutionally require fund-raisers to disclose certain financial information to the State, as it has since 1981." 487 U.S. at 795, 108 S.Ct. 2667. The Utah Act's registration and disclosure requirements do not differ materially from those upheld in *Riley*.

The registration and disclosure requirements are narrowly tailored to enable private citizens to protect themselves from fraudulent activity. The information required is relatively simple and readily available to the consultant. As American Target concedes, much of the information required is already available in its own tax forms and fund-raising registration materials in Virginia. The Court concludes that the Act's disclosure and registration requirements are sufficiently narrowly tailored to pass constitutional muster. [1]

b. The Registration Fee

American Target also argues that the $250.00 annual registration fee fails under the narrow tailoring requirement. American Target claims that the fee will make the cost of

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[1] American Target also argues that the registration and disclosure requirements amount to an unconstitutional prior restraint because consultants must register prior to conducting solicitations. In support of this argument, American Target points out that the Court in *Riley* struck down a provision requiring the fund-raiser to obtain a license before soliciting.

But the fatal flaw in the North Carolina licensing scheme is not present in the Utah Act. As the Court observed, licensing requirements "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.' " *Id.* at 802, 108 S.Ct. 2667 (quoting *Freedman v. Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). The Court struck down the law because it did not impose a time limitation on the licensing agency, either by statute or administrative regulation. *Id.*

Utah's Act contains no such defect. By administrative regulation, the Division must process registration applications "within 10 business days of their receipt by the Division." Utah Admin.Code R152-22-4(3). In this way, the Division can fairly review the application while preserving the First Amendment rights of the consultant by assuring a prompt decision.

fund-raising so high that mass-mailed interstate charitable solicitations will become impossible.

In considering the constitutional permissibility of registration fees imposed upon professional charitable solicitors in the state of New York, the United States Court of Appeals for the Second Circuit observed:

> It is well-settled that charitable solicitation involves a variety of speech interests protected by the First Amendment. "[I]t is equally clear that while the exercise of constitutionally protected activities may not be taxed, it may be regulated, provided the regulation is narrowly tailored to achieve a legitimate government interest, is content-neutral in terms and effect, and does not unduly burden speech." Thus, fees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible.

National Awareness Foundation v. Abrams, 50 F.3d 1159, 1164-65 (2d Cir.1995)(quoting *Center for Auto Safety, Inc. v. Alhey*, 37 F.3d 139, 144 (4th Cir.1994))(citations omitted); see also *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474 (6th Cir.1995) (upholding a $200 registration fee for professional solicitors).

American Target's attempt to distinguish *National Awareness Foundation v. Abrams* and *Dayton Area Visually Impaird Persons, Inc. v. Fisher* is unpersuasive. American Target argues that these cases are different than the case at bar because they deal with solicitors rather than professional fund-raising counsel. American Target argues that "solicitors" actually perform the act of soliciting money, and typically have possession over the funds that are contributed. But it is beyond dispute that American Target exercises significant control over the fund-raising and the money. Therefore,

the fact that American Target refers to itself as "counsel" rather than as a "solicitor" is irrelevant for our purposes here.

The fee provisions enable the State to defray the costs associated with the administration and enforcement of the Act. The Act itself mandates that the Division set an application fee that is "reasonable, fair, and reflect[s] the cost of services provided." Utah Code Ann. § 13-22-9(1)(a); Utah Code Ann. § 63-3 8-3.2(2). The evidence suggests that the Division complies scrupulously with this mandate, considering the resources it expends in administering and enforcing the Act in establishing the fee. Giani Affidavit, ¶ 7. No evidence in the record suggests that the fee is anything to the contrary. Therefore, the application fee survives constitutional scrutiny.

c. The Bond or Letter of Credit Requirement

For some of the same reasons, American Target argues that the requirement that consultants maintain a bond or letter of credit is unconstitutional. American Target claims that the requirement is more burdensome than necessary, and is not narrowly tailored to serve the State's interest of preventing fraud.

The Court is not convinced. This requirement protects the public by providing a fund from which victims can draw in the event that they are defrauded by charitable solicitors. Simultaneously, it also acts as a deterrent to fraudulent activity—presumably, fund-raisers will he less likely to defraud Utahns if they know that if they get caught, they will pay for it.

The United States Court of Appeals for the Sixth Circuit recently upheld Ohio's $20,000 bonding requirement, concluding that "because the bonding requirement imposed upon professional solicitors also attempts to deter fraud and to provide a fund from which to compensate charities for moneys, the district court [correctly] concluded that the requirement was narrowly tailored to serve a legitimate state interest."

Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1486 (1995).

Similarly, the bonding or letter of credit requirements in the Utah Act are narrowly tailored to serve the substantial interest of the State in protecting charities and Utah residents from fraud. The State has not required consultants to deposit the entire $25,000 with the State or in an escrow account. Instead, the State has imposed the less-burdensome requirement that the consultant obtain either a bond from a surety company or a letter of credit from the consultant's financial institution. This provides the public with a source from which to draw in the event of loss.

The purpose of the Act could not be a as effectively without such the bond or letter of credit requirement. Accordingly, it survives the scrutiny of the First Amendment.

d. Improper Discretion

Finally, American Target argues that the Act gives the Director of the Division of Consumer Protection improper discretion in issuing fund-raising licenses. The Director may deny or revoke a license if (1) such action is in the public interest and (2) after making a specified finding of wrongdoing under the Act. Utah Code Ann. §13-22-12. American Target claims that this provision gives the Director unbridled discretion because neither the Act nor administrative regulations pertaining to its enforcement define what "public interest" is.

However, the Act requires that the Director make a specified finding of wrongdoing before denying or revoking a license. The provision governing specified findings of wrongdoing is quite narrow, giving the Director discretion only where (1) the application for registration or renewal is incomplete or misleading in any material respect; (2) the applicant has violated the Act or failed to pay a fine imposed under the Act, (3) the applicant has been convicted of a crime involving moral turpitude; (4) an injunction or administrative

order has been entered against the applicant in which there was a finding or admission of fraud, breach of fiduciary duty, material misrepresentated, or where the injunction or order was based on a finding of lack of integrity, dishonesty, or mental incompetence of the applicant; (5) the consultant has materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation; (6) the consultant has failed reasonably to supervise its agents or employees, (7) the consultant has used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names; or (8) the consultant has failed to secure and/or maintain a $25,000 bond or letter of credit. Utah Code Ann. § 13-22-12.

Because the Director may only invoke her discretion after making a specific finding of wrongdoing in these limited areas, her discretion is quite narrow. In addition, the "public interest" language also places a limitation on the Director's discretion.

The denial and revocation provision does not give the Director undue discretion, and appears reasonably calculated to give the Act reasonable regulatory teeth. The Act could not be enforced as effectively without the provision. Accordingly, the Court concludes that it is narrowly tailored to further the purpose of the Act.

B. Constitutionality Under the Commerce Clause

The Commerce Clause gives Congress the power to regulate commerce "among the several States." United States Constitution Art. 1 § 8, cl. 3. This power is significant in two respects. First, i[t] operates as an affirmative grant of authority, enabling Congress to enact legislation in areas that substantially affect interstate commerce. Second, and relevant here, it limits the states' police powers by prohibiting state

regulations that unduly burden interstate commerce. This limitation of state authority, commonly referred to as the "dormant" Commerce Clause, "is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Lewis v. BT Investment Managers, Inc.*, 441 U.S. 27, 35, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980).

The text of the Commerce Clause provides no guidance on the extent to which states can regulate interstate commerce in the absence of Congressional legislation. It has therefore been left to the courts to delineate the Commerce Clause-imposed boundaries of state regulation.

A state law may be found unconstitutional under the dormant Commerce Clause in either of two situations—either (1) where the state regulation directly regulates or otherwise discriminates against interstate commerce, *see e.g., Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), or (2) where the regulation operates in a nondiscriminatory manner, burdening interstate commerce only indirectly, and the burden imposed upon interstate commerce is clearly excessive in relation to the putative local benefits, *see e.g., Pike v. Bruce Church Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

1. Direct Regulation of Interstate Commerce

American Target first argues that, through the framework established by the Utah Charitable Solicitations Act, the State of Utah is attempting to directly regulate contractual agreements between American Target and its nonprofit clients in other states. While acknowledging that the Act does not discriminate against interstate commerce on its face, American Target claims that the Utah Act is similar to the statute de-

clared unconstitutional in *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) in that it attempts to directly regulate the out-of-state contracts of an out-of-state person, and therefore constitutes a virtual per se violation of the Commerce Clause.

In *Brown-Forman*, a distiller brought suit when the State of New York began requiring all liquor distillers doing business in New York to sell at a price no higher than the lowest price that the distiller charged anywhere else in the United States. The Supreme Court held that the statute violated the dormant Commerce Clause. Rather than relying on a discrimination rationale,[2] however, the Court attacked the law on grounds that it enabled New York to "project its legislation into" other states. The Court reasoned that the New York law

> [R]egulate[d] out-of-state transactions in violation of the commerce clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the Untied State during the relevant month. **Forcing a [business entity] to seek regulatory approval in one state before undertaking a transaction in another directly regulates interstate commerce**. While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not "project its legislation into [other states] by regulating the price to be paid" for liquor in those states . . . That the [law] is addressed only to sales of liquor in New York is irrelevant if the "practical effect" of the law is to control liquor prices in other states. . .. Moreover, the proliferation of [similar state] laws . . . has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different states. . . . Thus New

[2] The Court declined using the discrimination rationale because the appellant conceded that the statute was "evenhanded."

> York has "project[ed]" its legislation into other states, and directly regulated commerce therein, in violation of [the dormant Commerce Clause].

Brown-Forman, 476 U.S. at 582-83, 106 S.Ct. 2080 (emphasis added) (citations omitted).

American Target analogizes its own plight to that of the plaintiff/distiller in *Brown-Forman*, arguing that Utah attempted to regulate American Target, an out-of-state business. In support of this argument, American Target points out that the Division of Consumer Protection denied Judicial Watch a license because of its relationship with American Target. Even when the Division later granted the license, it did so only on condition that Judicial Watch not correspond with Utah residents using materials developed with any assistance from American Target.

The Court is not persuaded. Unlike the *Brown-Forman* plaintiff, American Target's out-of-state activities are not being controlled by an overreaching state statute. American Target is subject to Utah regulation only to the extent that it provides consulting services in connection with charitable solicitations in Utah.

In no way does the Act regulate American Target's consulting services that do not pertain to charitable solicitations in Utah. Simply stated, the Act is not unconstitutional under *Brown-Forman* because it does not have the " 'practical effect' of . . . controll[ing] [professional fund-raisers] in other states." *Id.* at 582-83, 106 S.Ct. 2080.

2. Indirect Regulation of Interstate Commerce

The Supreme Court's ruling in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) is said to embody the modern negative Commerce Clause test in cases that do not involve facially discriminatory state regulations. In *Pike*, the Court held that the State of Arizona could not require Arizona cantaloupe growers to package their produce in Arizona. The Court explained that where the challenged state

statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental" the statute will survive a dormant Commerce Clause attack unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844.

While acknowledging that Utah has a "legitimate local public interest" in enforcing the Act, American Target argues that the Act unduly burdens interstate commerce by imposing: (1) the annual application fee of $250.00, (2) the $25,000 bonding requirement, and (3) the registration and disclosure requirements. The party challenging a non-discriminatory statue under the dormant Commerce Clause "bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest." *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir.1992). American Target has failed to produce any evidence showing that the incidental burdens that the Act may impose on interstate commerce are clearly excessive in relation to the benefits that the Act produces.

Moreover, as explained above in the Court's discussion of American Target's First Amendment claims, the challenged provisions are reasonably necessary to prevent and remedy the effects of fraud. Any resulting burdens on interstate commerce are minimal by comparison. Accordingly, the Court concludes that the Act does not run afoul of the dormant Commerce Clause under the *Pike v. Bruce Church* balancing test.

C. The Charitable Solicitations Act Does Not Violate the Due Process Clause.

American Target also contends that the Act is invalid under the Due Process Clause of the Fourteenth Amendment, arguing that applying the Act to American Target constitutes "an impermissible extra-territorial exercise of the State's police

powers." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 24.

The Court does not agree. American Target plays a most significant role in Judicial Watch's solicitations, including those directed toward Utah. A reading of the Contract between Judicial Watch and American Target reveals that American Target (1) prepares the creative copy and design of the mailings, (2) plans and manages the production services relevant to direct mail solicitations. Agreement Between Judicial Watch and American Target, Complaint Exhibit 1,§ 1. It is safe to say that American Target is not only Judicial Watch's fund-raising consultant, it is primarily responsible for " build[ing] a [] base of supporters across the country" and within Utah. Deposition of American Target Vice President James Carney at 50.

In short, it is safe to say that American Target has " 'purposely directed' " its fund-raising efforts "toward residents of [Utah]." *Burger King Corp v. Rudzewicz*, 471 U.S. 462,476,105 S.Ct. 2174, 85 L.Ed 2d 528 (1985). In so doing, American Target has established minimum contacts with the State of Utah so as to subject itself to the jurisdiction of Utah courts in matters arising out of or relating to their Utah fund-raising activities. Utah may therefore require American Target to submit to the requirements of the Utah Charitable Solicitations Act without violating the Due Process Clause of the Fourteenth Amendment.

III. CONCLUSION

In Accordance with the foregoing, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is DENIED, and Defendant's Motion for Summary Judgment is GRANTED.

APPENDIX C

UTAH STAT. ANN. SECTIONS 13-22-1 *et seq.*

13-22-1 Short title.

This chapter is known as the "Charitable Solicitations Act."

13-22-2 Definitions.

As used in this chapter:

(1) (a) "Charitable organization" or "organization" means any person, joint venture, partnership, limited liability company, corporation, association, group, or other entity, excluding the state and its political subdivisions:

(i) that is or holds itself out to be:

(A) a benevolent, educational, voluntary health, philanthropic, humane, patriotic, religious or eleemosynary, social welfare or advocacy, public health, environmental or conservation, or civic organization;

(B) for the benefit of a public safety, law enforcement, or firefighter fraternal association; or

(C) established for any charitable purpose;

(ii) who solicits or obtains contributions solicited from the public for a charitable purpose; or

(iii) in any manner employs a charitable appeal as the basis of any solicitation or employs an appeal that reasonably suggests or implies that there is a charitable purpose to any solicitation.

(b) "Charitable organization" includes a "chapter," "branch," "area," "office," or similar "affiliate" or any

person soliciting contributions within the state for a charitable organization that has its principal place of business outside the state.

(2) "Charitable purpose" means any benevolent, educational, philanthropic, humane, patriotic, religious, eleemosynary, social welfare or advocacy, public health, environmental, conservation, civic, or other charitable objective or for the benefit of a public safety, law enforcement, or firefighter fraternal association.

(3) "Charitable solicitation" or "solicitation" means any request, directly or indirectly, for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including any telephonic request;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication; or

(c) the sale of, offer or attempt to sell, or request of donations in exchange for any advertisement, book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or the use of the name of any charitable organization or movement as an inducement or reason for making any purchase donation, or, in connection with any sale or donation, stating or implying that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose.

(4) (a) "Contribution" means the pledge or grant for a charitable purpose of any money or property of any kind, including any of the following:

(i) a gift, subscription, loan, advance, or deposit of money or anything of value;

(ii) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for charitable purposes; and

(iii) fees, dues, or assessments paid by members, when membership is conferred solely as consideration for making a contribution.

(b) Contribution" does not include:

(i) money loaned to a charitable organization by a financial institution in the ordinary course of business; or

(ii) fees, dues, or assessments paid by members when membership is not conferred solely as consideration for making a contribution.

(5) "Contributor" means any donor, pledgor, purchaser, or other person who makes a contribution.

(6) "Director" means the director of the Division of Consumer Protection.

(7) "Division" means the Division of Consumer Protection of the Department of Commerce.

(8) "Material fact" means information that a person of ordinary intelligence and prudence would consider relevant in deciding whether or not to make a contribution in response to a charitable solicitation.

(9) (a) "Paid solicitor" means any person who, for financial or other consideration:

(i) solicits contribution for charitable purposes; or

(ii) acts as an employee or agent for any charitable organization or professional fund raiser to solicit contributions for charitable purposes.

(b) "Paid solicitor" does not include any clerical employee who is not primarily involved with soliciting.

(10) (a) "Professional fund raiser," except as provided in Subsection (10)(b), means any person who:

(i) for compensation or any other consideration plans or manages the solicitation of contributions for or on behalf of any charitable organization or any other person;

(ii) engages in, or who holds himself out to persons in this state as being independently engaged in, the business of soliciting contributions for a charitable organization;

(iii) manages, supervises, or trains any paid solicitor; or

(iv) uses a vending device or vending device decal for financial or other consideration that implies a solicitation of contributions or donations for any charitable organization or charitable purposes.

(b) "Professional fund raiser" does not include a bona fide officer, director, volunteer, or full-time employee of a charitable organization.

(11) (a) "Professional fund raising counsel or consultant" or other comparable designation or title means a person who:

(i) for compensation plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization, whether or not at any time the person has custody of contributions from a solicitation;

(ii) does not solicit contributions; and

(iii) does not employ, procure, or engage any compensated person to solicit or receive contributions.

(b) "Professional fund raising counsel or consultant" does not include an attorney, investment counselor, or banker who in the conduct of that person's profession advises a client when actually engaged in the giving of legal, investment, or financial advice.

(12) "Vending device" means a container used by a charitable organization, paid solicitor, or professional fund raiser, for the purpose of collecting a charitable solicitation, contribution, or donation whether or not the device offers a product or item in return for the contribution or donation. "Vending device" includes machines, boxes, jars, wishing wells, barrels, or any other container.

(13) "Vending device decal" means any decal, tag, or similar designation material that is attached to a vending device, whether or not used or placed by a charitable organization, paid solicitor, or professional fund raiser, that would indicate that all or a portion of the proceeds from the purchase of items from the vending device will go to a specific charitable organization.

13-22-3 Investigative and enforcement powers --Education.

(1) The division may make any investigation it considers necessary to determine whether any person is violating, has violated, or is about to violate any provision of this chapter or any rule made or order issued under this chapter. As part of the investigation, the division may:

(a) require a person to file a statement in writing;

(b) administer oaths, subpoena witnesses and compel their attendance, take evidence, and examine

under oath any person in connection with an investigation; and

(c) require the production of any books, papers, documents, merchandise, or other material relevant to the investigation.

(2) Whenever it appears to the director that substantial evidence exists that any person has engaged in, is engaging in, or is about to engage in any act or practice prohibited in this chapter or constituting a violation of this chapter or any rule made or order issued under this chapter, the director may do any of the following in addition to other specific duties under this chapter:

(a) in accordance with Title 63, Chapter 46b, Administrative Procedures Act, the director may issue an order to cease and desist from engaging in the act or practice or from doing any act in furtherance of the activity; or

(b) the director may bring an action in the appropriate district court of this state to enjoin the acts or practices constituting the violation or to enforce compliance with this chapter or any rule made or order issued under this chapter.

(3) Whenever it appears to the director by a preponderance of the evidence that a person has engaged in or is engaging in any act or practice prohibited in this chapter or constituting a violation of this chapter or any rule made or order issued under this chapter, the director may assess an administrative fine of up to $500 per violation up to $10,000 for any series of violations arising out of the same operative facts.

(4) Upon a proper showing, the court hearing an action brought under Subsection (2)(b) may:

(a) issue an injunction;

(b) enter a declaratory judgment;

(c) appoint a receiver for the defendant or the defendant's assets;

(d) order disgorgement of any money received in violation of this chapter;

(e) order rescission of agreements violating this chapter;

(f) impose a fine of not more than $2,000 for each violation of this chapter; and

(g) impose a civil penalty, or any other relief the court considers just.

(5)(a) In assessing the amount of a fine or penalty under Subsection (3) (4)(f), or (4)(g), the director or court imposing the fine or penalty shall consider the gravity of the violation and the intent of the violator.

(b) If it does not appear by a preponderance of the evidence that the violator acted in bad faith or with intent to harm the public, the director or court shall excuse payment of the fine or penalty.

(6) The division may provide or contract to provide public education and voluntary education for applicants and registrants under this chapter. The education may be in the form of publications, advertisements, seminars, courses, or other appropriate means. The scope of the education may include:

(a) the requirements, prohibitions, and regulated practices under this chapter;

(b) suggestions for effective financial and organizational practices for charitable organizations;

(c) charitable giving and solicitation;

(d) potential problems with solicitations and fraudulent or deceptive practices; and

(e) any other matter relevant to the subject of this chapter.

13-22-4 Violation a misdemeanor --Damages.

(1) A person who willfully violates any provision of this chapter, either by failing to comply with any requirement or by doing any act prohibited in the chapter, is guilty of a class B misdemeanor. Each day the violation is committed or permitted to continue constitutes a separate punishable offense.

(2) Nothing in this section precludes any person damaged as a result of a charitable solicitation from maintaining a civil action for damages or injunctive relief.

(3) The division may maintain an action for damages or injunctive relief on behalf of itself or any other person to enforce compliance with this chapter.

13-22-5 Registration required.

(1) It is unlawful for any organization that is not exempt under Section 13-22-8 to knowingly solicit, request, promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable purpose, unless the organization is registered with the division.

(2) Subsection (1) does not prohibit an organization from receiving an unsolicited contribution.

(3) It is unlawful for any professional fund raiser to knowingly solicit, request, promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable organization, whether or not the charitable organization is

exempt under Section 13-22-8, unless the professional fund raiser is registered with the division.

(4) It is unlawful for any professional fund raising counsel or consultant to knowingly plan, manage, advise, counsel, consult, or prepare material for, or with respect to, the solicitation in this state of a contribution for a charitable organization, whether or not the charitable organization is exempt under Section 13-22-8, unless the professional fund raising counsel or consultant is registered with the division.

13-22-6 Application for registration.

(1) An applicant for registration or renewal of registration as a charitable organization shall:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division which shall include:

(i) the organization's name, address, telephone number, facsimile number, if any, and the names and addresses of any organizations or persons controlled by, controlling, or affiliated with the applicant;

(ii) the specific legal nature of the organization, that is, whether it is an individual, joint venture, partnership, limited liability company, corporation, association, or other entity;

(iii) the names and residence addresses of the officers and directors of the organization;

(iv) the name and address of the registered agent for service of process and a consent to service of process;

(v) the purpose of the solicitation and use of the contributions to be solicited;

(vi) the method by which the solicitation will be conducted and the projected length of time it is to be conducted;

(vii) the anticipated expenses of the solicitation, including all commissions, costs of collection, salaries, and any other items;

(viii) a statement of what percentage of the contributions collected as a result of the solicitation are projected to remain available for application to the charitable purposes declared in the application, including a satisfactory statement of the factual basis for the projected percentage;

(ix) a statement of total contributions collected or received by the organization within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use made of the contributions;

(x) a copy of any written agreements with any professional fund raiser involved with the solicitation;

(xi) disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or principal of the organization;

(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds for the solicitation or fundraising;

(xiii) a statement of whether or not the charity, or its parent foundation, will be using the services of a professional fund raiser or of a professional fund raising counsel or consultant;

(xiv) if either the charity or its parent foundation will be using the services of a professional fund raiser or a professional fund raising counsel or consultant:

(A) a copy of all agreements related to the services; and

(B) an acknowledgment that fund raising in the state will not commence until both the charitable organization, its parent foundation, if any, and the professional fund raiser or professional fund raising counsel or consultant are registered and in compliance with this chapter; and

(xv) any additional information the division may require by rule.

(2) If any information contained in the application for registration becomes incorrect or incomplete, the applicant or registrant shall, within 30 days after the information becomes incorrect or incomplete, correct the application or file the complete information required by the division.

(3) In addition to the registration fee, an organization failing to file a registration application or renewal by the due date or filing an incomplete registration application or renewal shall pay an additional fee of $25 for each month or part of a month after the date on which the registration application or renewal were due to be filed.

13-22-7 Repealed.

13-22-8 Exemptions.

(1) Section 13-22-5 does not apply to:

(a) a solicitation that an organization conducts among its own established and bona fide membership

exclusively through the voluntarily donated efforts of other members or officers of the organization;

(b) a bona fide religious, ecclesiastical, or denominational organization if:

(i) the solicitation is made for a church, missionary, religious, or humanitarian purpose; and

(ii) the organization is:

(A) a lawfully organized corporation, institution, society, church, or established physical place of worship, at which nonprofit religious services and activities are regularly conducted and carried on;

(B) a bona fide religious group:

(I) that does not maintain specific places of worship;

(II) that is not subject to federal income tax; and

(III) not required to file an IRS Form 990 under any circumstance; and

(C) a separate group or corporation that is an integral part of an institution that is an income tax exempt organization under 26 U.S.C. Sec. 501(c)(3) and is not primarily supported by funds solicited outside its own membership or congregation;

(c) a solicitation by a broadcast media owned or operated by an educational institution or governmental entity, or any entity organized solely for the support of that broadcast media;

(d) except as provided in Subsection 13-22-21(1), a solicitation for the relief of any person sustaining a

life-threatening illness or injury specified by name at the time of solicitation if the entire amount collected without any deduction is turned over to the named person;

(e) a political party authorized to transact its affairs within this state and any candidate and campaign worker of the party if the content and manner of any solicitation make clear that the solicitation is for the benefit of the political party;

(f) a political action committee or group soliciting funds relating to issues or candidates on the ballot if the committee or group is registered with the lieutenant governor's office under:

(i) Title 20A, Chapter 11, Part 6, Political Action Committee Registration and Financial Reporting Requirements; or

(ii) Title 20A, Chapter 11, Part 8, Political Issues Committees -- Registration and Financial Reporting;

(g) any school accredited by the state, any accredited institution of higher learning, or club or parent, teacher, or student organization within and authorized by the school in support of the operations or extracurricular activities of the school;

(h) a public or higher education foundation established under Title 53A or 53B;

(i) a television station, radio station, or newspaper of general circulation that donates air time or print space for no consideration as part of a cooperative solicitation effort on behalf of a charitable organization, whether or not that organization is required to register under this chapter; and

(j) a volunteer fire department, rescue squad, or local civil defense organization whose financial oversight is under the control of a local governmental entity.

(2) Any organization claiming an exemption under this section bears the burden of proving its eligibility for, or the applicability of, the exemption claimed.

(3) Each organization exempt from registration pursuant to this section that makes a material change in its legal status, officers, address, or similar changes shall file a report informing the division of its current legal status, business address, business phone, officers, and primary contact person within 30 days of the change.

(4) The division may by rule:

(a) require organizations exempt from registration pursuant to this section to file a notice of claim of exemption;

(b) prescribe the contents of the notice of claim; and

(c) require a filing fee for the notice, as determined under Section 63- 38-3.2.

13-22-9 Professional fund raiser's or fund raising counsel's or consultant's permit.

(1) It is unlawful for any person or entity to act as a professional fund raiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division by complying with all of the following application requirements:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division that includes:

(i) the applicant's name, address, telephone number, facsimile number, if any;

(ii) the name and address of any organization or person controlled by, controlling, or affiliated with the applicant;

(iii) the applicant's business, occupation, or employment for the three- year period immediately preceding the date of the application;

(iv) whether it is an individual, joint venture, partnership, limited liability company, corporation, association, or other entity;

(v) the names and residence addresses of any officer or director of the applicant;

(vi) the name and address of the registered agent for service of process and a consent to service of process;

(vii) if a professional fund raiser:

(A) the purpose of the solicitation and use of the contributions to be solicited;

(B) the method by which the solicitation will be conducted and the projected length of time it is to be conducted;

(C) the anticipated expenses of the solicitation, including all commissions, costs of collection, salaries, and any other items;

(D) a statement of what percentage of the contributions collected as a result of the solicitation are projected to remain available to the charitable organization declared in the application, including a satisfactory statement of the factual basis for the projected percentage and projected anticipated revenues provided to the charitable organization, and if a flat fee is charged,

documentation to support the reasonableness of the flat fee; and

(E) a statement of total contributions collected or received by the professional fund raiser within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use made of the contributions;

(viii) if a professional fund raising counsel or consultant:

(A) the purpose of the plan, management, advise, counsel or preparation of materials for, or respect to the solicitation and use of the contributions solicited;

(B) the method by which the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation will be organized or coordinated and the projected length of time of the solicitation;

(C) the anticipated expenses of the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation, including all commissions, costs of collection, salaries, and any other items;

(D) a statement of total fees to be earned or received from the charitable organization declared in the application, and what percentage of the contributions collected as a result of the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation are projected after deducting the total fees to be earned or received remain available to the charitable organization declared in the application,

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(xiii) anot commence until both the professional
state will nf or professional fund raising counsel or
fund raiser and the charity, its parent foundation, if
consultant

any, are registered and in compliance with this chapter; and

(xiv) any additional information the division may require.

(2) If any information contained in the application for a permit becomes incorrect or incomplete, the applicant or registrant shall, within 30 days after the information becomes incorrect or incomplete, correct the application or file the complete information required by the division.

(3) In addition to the permit fee, an applicant failing to file a permit application or renewal by the due date or filing an incomplete permit application or renewal shall pay an additional fee of $25 for each month or part of a month after the date on which the permit application or renewal were due to be filed.

(4) (a) Each applicant shall provide proof that the applicant is either bonded or provide a letter of credit in the amount of at least $25,000.

(b) The bond or letter or credit shall be payable to the state for the benefit of parties who may be damaged by any violation of this chapter.

(c) (i) The issuer of a bond shall be a surety authorized to transact surety business in this state.

(ii) The letter of credit shall be from a federally insured depository institution.

(d) The applicant shall maintain the bond or letter of credit for the entire duration of the permit and for a period of not less than one year after the division received notice in writing from the professional fund raiser or professional fund raising counsel or consultant that all activities in the state have ceased.

(e) The division may prescribe rules under which parties may recover on the bond or letter of credit.

13-22-10 Obtaining, use and display of permits and information cards.

(1) (a) Each paid solicitor who makes a person-to-person solicitation for a charitable organization registered or required to be registered under this chapter shall, before making the solicitation, obtain an information card issued by the division.

(b) An information card may be obtained from:

(i) the division; or

(ii) if the charitable organization has obtained information cards under Subsection (2), from the charitable organization for whom the solicitation is being made.

(2) A charitable organization registered under this chapter may obtain information cards from the division upon payment of a $2 fee for each card. The charitable organization may distribute an information card only to a paid solicitor employed by the charitable organization.

(3) Each permit and information card issued by the division shall set forth such information as will assist any person solicited to determine the purpose for which the contribution is solicited, including:

(a) (i) if it is an information card or a professional fund raiser permit, the identity of the person making the solicitation;

(ii) if the permit is for a charitable organization, the identity of the organization;

(iii) if it is an information card, the identity of the organization for which the contribution is solicited;

(b) an official acknowledgment or seal that the permit is issued by the division or, in the case of an information card, that the card is on a form supplied by the division;

(c) the statement required under Subsection 13-22-14(2);

(d) the expiration date of the permit or information card; and

(e) any other information that the division may prescribe by rule.

(4) In any solicitation in person, each holder of a permit or information card shall maintain in his possession the permit or information card and shall display the permit or information card to each person solicited. In any telephonic solicitation, the information contained on the permit or information card shall be distinctly and clearly repeated as part of the solicitation.

(5) The division may by rule prescribe additional provisions to govern the manner of using, displaying, or communicating the information on the permit or information card in connection with a solicitation.

(6) A person who solicits contributions for no compensation is not required to have an information card but shall clearly inform the person solicited of the charitable organization on whose behalf the person is soliciting.

13-22-11 Expiration of registration and permits.

(1) Each charitable organization registration issued under this chapter expires annually on the earlier of January 1, April 1, July 1, or October 1 following the completion of 12 months after the date of initial issuance.

(2) Each professional fund raiser's permit issued under this chapter expires the earlier of:

(a) annually on the date of issuance; or

(b) when the professional fund raiser ceases affiliation with the charitable organization named in the application for permit.

(3) Each professional fund raising counsel's or consultant's permit issued under this chapter expires the earlier of:

(a) annually on the date of issuance; or

(b) when the professional fundraising counsel or consultant ceases affiliation with the charitable organization named in the application for permit.

(4) A registration or permit may be renewed only by complying with the requirements for obtaining the original registration or permit.

13-22-12 Grounds for denial, suspension, or revocation.

(1) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to deny, suspend, or revoke an application, registration, permit, or information card, upon a finding that the order is in the public interest and that:

(a) the application for registration or renewal is incomplete or misleading in any material respect;

(b) the applicant or registrant or any officer, director, agent, or employee of the applicant or registrant has:

(i) violated this chapter or committed any of the prohibited acts and practices described in this chapter;

(ii) been enjoined by any court, or is the subject of an administrative order issued in this or another state, if the injunction or order includes a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or if the injunction or order was based on a finding of lack of integrity, truthfulness, or mental competence of the applicant;

(iii) been convicted of a crime involving moral turpitude;

(iv) obtained or attempted to obtain a registration or a permit by misrepresentation;

(v) materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation;

(vi) caused or allowed any paid solicitor to violate any rule made or order issued under this chapter by the division;

(vii) failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fund raising counsels or consultants;

(viii) used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names;

(ix) failed to timely file with the division any report required in this chapter or by rules made under this chapter; or

(x) failed to pay a fine imposed by the division in accordance with Section 13-22-3;

(c) a professional fund raiser or professional fund raising counselor or consultant does not have a bond or letter of credit in force as required by Subsection 13-22-9(4); or

(d) the applicant for registration or renewal has no charitable purpose.

(2) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to revoke

or suspend a claim of exemption filed under Subsection 13-22-8(4), upon a finding that the order is in the public interest and that:

(a) the notice of claim of exemption is incomplete or false or misleading in any material respect; or

(b) any provision of this chapter, or any rule made or order issued by the division under this chapter has been violated in connection with a charitable solicitation by any exempt organization.

13-22-13 Prohibited practices.

In connection with any solicitation, each of the following acts and practices is prohibited:

(1) stating or implying that registration constitutes endorsement or approval by the division or any governmental entity;

(2) violating any of the requirements of this chapter or any rule made under this chapter;

(3) making any untrue statement of a material fact or failing to state a material fact necessary to make statements made, in the context of the circumstances under which they are made, not misleading, whether in connection with a charitable solicitation or a filing with the division; and

(4) violating an order issued by the division under Subsection 13-22-3(2) or (3).

13-22-14 Accuracy not guaranteed.

(1) By issuing a permit or by providing forms for an information card, the state does not guarantee the accuracy of any representation contained in the permit or information card, nor does it warrant that any statement made by the holder of the permit or information card is truthful. The state

makes no certification as to the charitable worthiness of any organization on whose behalf a solicitation is made nor as to the moral character of the holder of the permit or information card.

(2) The following statement shall appear on each permit and information card in uppercase letters, in close proximity to the seal or acknowledgment required under Subsection 13-22-10(3)(b): "THE STATE OF UTAH DOES NOT WARRANT THAT THE INFORMATION CONTAINED ON THIS CARD IS TRUE."

13-22-15 Financial reports required.

(1) Each charitable organization registered under this chapter shall, during its first year of registration, provide quarterly financial reports to the division within 30 days after the end of the quarter reported. Each report shall disclose:

(a) the gross amount of contributions received;

(b) the amount of contributions disbursed or to be disbursed to each charitable organization or charitable purpose represented;

(c) aggregate amounts paid to any professional fund raiser;

(d) amounts spent for overhead, expenses, commissions, and similar purposes; and

(e) the name and address of any paid solicitor used by the organization.

(2) After the first year of continuous registration, a charitable organization shall file an annual financial report or IRS Form 990 on an annual basis within 30 days after the end of the year reported.

(3) Each report required under this section shall be signed under oath by an officer or principal of the organization.

(4) The registration of any organization that fails to file a timely report or IRS Form 990 as required in this section or files an incomplete report or IRS Form 990 is automatically suspended pending a final order of the division under Section 13-22-12. The division may reinstate the registration after receiving:

(a) a report or IRS Form 990 fulfilling the requirements of this section;

(b) an application for renewed registration; and

(c) a penalty of $25 for each month or part of a month after the date on which the quarterly report or IRS Form 990 was due to be filed.

13-22-16 Separate accounts and receipts required.

(1) Each organization required to be registered under this chapter and each professional fund raiser and paid solicitor shall segregate and maintain all contributed funds in an account held separately from its operating account. The account shall be held in Utah at a depository institution regulated by the Department of Financial Institutions.

(2) Each organization required to be registered under this chapter and each professional fund raiser and paid solicitor shall maintain and use duplicate receipts for contributions of money, securities, and cash equivalents so that one receipt is issued to each contributor and one is maintained by the organization.

13-22-17 Written agreement required.

(1) A professional fund raiser may only engage in activities on behalf of a charitable organization through written agreement with the organization.

(2) A professional fund raising counsel or consultant may only engage in activities on behalf of a charitable organization through written agreement with the organization.

(3) A charitable organization may only engage the services of a professional fund raiser or professional fund raising counsel or consultant through written agreement.

(4) Copies of the agreement required by this section shall be attached to all applications for registration and or a permit.

13-22-18 Local ordinance.

This chapter does not prohibit any political subdivision of the state from enacting any ordinance regulating the solicitation of contributions within the subdivision's boundaries so long as the ordinance only coordinates enforcement of this chapter with the division.

13-22-19 Reciprocal agreements.

(1) The division may convey or exchange information obtained under this chapter with other agencies having regulatory authority over charitable organizations.

(2) The division may accept information that a charitable organization or professional fund raiser files in another state or with any federal agency or other organization in place of substantially similar information that is required to be filed under this chapter.

13-22-20. Renumbered.

13-22-21 Tax exempt organizations --Appeal on behalf of individual.

(1) If a charitable campaign consisting of exempt solicitations for the relief of a named individual sustaining a

life-threatening illness or injury, as described in Subsection 13-22-8(1)(d), collects proceeds in excess of $1,000, the organizer of the campaign shall give the division written notice of the following:

(a) the organizer's name and address;

(b) the name, whereabouts, and present condition of the person for whose relief the contributions are solicited including a letter from the person's attending physician detailing the illness or injury;

(c) the date the charitable campaign commenced; and

(d) the purpose to which the collected contributions are to be applied.

(2) Notice under Subsection (1) is due within ten days after commencing the appeal or collecting in excess of $1,000, whichever is later.

(3) If the organizer fails to file timely notice, the division shall inform the organizer of the notice requirement and give the organizer ten additional days as a grace period within which to file the notice. If the organizer fails to file the notice within the grace period, the division may issue a cease and desist order against the organizer.

(4) If, at any time, the division has reasonable cause to believe that the organizer is perpetrating a fraud against the public, or in any other way intends to profit from harming the public through the charitable campaign, it shall issue a cease and desist order against the organizer.

(2)

No. 99-1647

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In The

Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,

Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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INTEREST OF AMICUS

[1]This brief is filed by amicus National Federation of Nonprofits. Information concerning the National Federation of Nonprofits is appended hereto.

STATEMENT OF THE CASE

The case presented to the Court involves the important issue of the extent to which states can regulate charitable organizations' appeals to the public. Amicus National Federation of Nonprofits asserts that the appellate court applied an incorrect standard of scrutiny to a Utah law which regulates fully-protected speech, i.e. educational speech and advocacy that includes an appeal for support conducted by Petitioner's charitable clients and other similarly-situated organizations. Because the law regulates fully-protected speech it is properly subject to strict scrutiny and should be struck down unless narrowly tailored to further a compelling government purpose by the least restrictive means.

The law of the State of Utah requires that a charitable organization as that term is defined under the state law[2] only hire licensed consultants to advise them concerning

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amicus states that no counsel other than counsel for the amicus authored this brief in whole or in part and no other person made a monetary contribution to the preparation of this brief.

[2] Utah Code Ann. § 13-22-2(1)(a).

how they raise money. This law applies despite the fact that the consultant may never set foot in Utah, the charity is already licensed and the charity is the author of any appeals which are delivered to Utah residents. The costs of this licensure are necessarily passed on to the charities which choose or are forced by economic necessity to hire consultants. Charities with consultants on staff or which can afford to produce the necessary material in-house do not have to absorb the additional costs and restrictions imposed by the Utah law. Therefore, identical charities delivering the same appeal by the same means are treated differently with no valid justification under the challenged law.

This law interferes with fully-protected activity under the First Amendment to the United States Constitution as well as the Commerce Clause to the United States Constitution. Because of its direct effect on fully-protected speech, the law should be subject to strict scrutiny, and should be struck down as a prior restraint of speech, as an overly burdensome regulation of speech and as an interference on interstate commerce.

More than 40 states regulate appeals for support by charitable organizations. Most states require charities to provide organizational documents, an audit and/or IRS Form 990, information about the organization's officers, directors and program service, as well as the contracts the organization may have with professional consultants. The information the Utah law requires professional fundraising consultants to file with the state in large part either duplicates the information which charities must already provide or is irrelevant. The consultant must also post a bond and pay a fee. Utah Code Ann. § 13-22-9. There is

no legitimate reason for the law's application to Petitioner, and for this reason the law is unconstitutional.

After the U.S. District Court dismissed the action, the 10th Circuit Court of Appeals affirmed in part and reversed in part. The opinion found that the Act was "content neutral" and subject to an intermediate level of scrutiny. Pet. App. 4a. The Court held that portions of the law vest licensure discretion in the Director of the Division of Consumer Protection and therefore constituted a prior restraint. *Id.* at 10a. The opinion rejected the argument that the law violated the Commerce Clause.

Petitioner then requested a writ of certiorari which this Brief urges the Court to grant.

SUMMARY OF ARGUMENT

The Petitioner provides advice to charities with regard to their efforts to educate and/or advocate to the public about their causes and appeal to the public for support of those causes. This activity is a form of speech, fully-protected by the First Amendment to the United States Constitution. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

Utah law requires licensure of consultants hired by charities to advise them on any form of appeal for public support. Utah Code Ann. § 13-22-9. This Court has held

three times that the involvement of a professional consultant in fundraising by a charity does not change the fully-protected nature of that activity – the fundraising aspect of any appeal is "inextricably intertwined" with the expressive nature of the contact, and, as such, charitable fundraising is protected at the core of the First Amendment. Limitations of this fully-protected expressive activity, therefore, are inherently suspect. *Riley*, 487 U.S. 781, 790.

The Utah statute is a content-based restriction on the appeal for public support. The law only applies if a Utah resident is asked to support the charity. A letter of advocacy which did not contain an appeal for support would not be regulated. The application of the law turns on whether the charitable communication contains an appeal for support. Yet, consultants to for-profit businesses mailing offers for goods or services into Utah are not required to register or post a bond, though it seems even more likely that such offers could potentially be fraudulent, prevention of which is the stated purpose of Utah's law, than charitable appeals.

Should the State of Utah legislate to require direct marketing consultants who advise sellers of goods or services to register as a precondition to a business sending mail offers to Utah residents, the legislation would not withstand constitutional review under either the commerce clause or commercial speech doctrines. *See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986). This Court has held that the First Amendment forbids application of a more restrictive regime to nonprofits' speech than applicable to commercial speech. *Metromedia, Inc. v. San Diego*, 453 U.S.

490, 513 (1981). The challenged law clearly violates this standard.

Utah's law also creates a prior restraint of protected speech by prohibiting some charities from delivering their messages to residents of the state and by creating an economic barrier to some organizations' solicitations even though their messages may be identical to those of other, unregulated charities.

Because Utah's law is a content-based restriction on fully-protected speech and a prior restraint, it is subject to strict scrutiny. The Tenth Circuit Court of Appeals erred in applying an intermediate level of scrutiny to this statute which regulates activity protected at the highest level by the First Amendment.

ARGUMENT

I. THE APPEAL FOR SUPPORT OF THE PUBLIC BY NONPROFIT ORGANIZATIONS IS FULLY-PROTECTED BY THE FIRST AMENDMENT.

In the decade of the 1980's, this Court ruled three times that the appeal for support by a charity was entitled to plenary protection by the First Amendment. Most recently, this Court held that the solicitation of charitable contributions is protected speech and that the involvement of a paid professional in the production and delivery of that speech did not alter in any way its fully-protected nature. *Riley*, 487 U.S. at 789 and 795-6. *See also Schaumburg*, 444 U.S. at 632 and *Munson*, 467 U.S. at 967.

In *Schaumburg* the Supreme Court held that:

> . . . charitable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment.

444 U.S. at 632.

The appeal for financial support cannot be successful unless linked to education and advocacy, i.e., the cause. In *Riley* and its predecessors, this Court refused to separate one function from the other. *Riley* also recognized that speakers delivering identical messages should not be subject to different restrictions on their speech based solely on the use of outside professionals versus employees. The speech is the same, and one appeal is no more likely than the other to be fraudulent. 487 U.S. at 791. For this reason, fundraising is equally important, and "inextricably intertwined" with more traditionally expressive activities.

Thus the Utah law cannot be considered to be merely an economic licensure law, for the finances it regulates directly affect speech. In *Riley* this Court held that:

> Whether one views this as a restriction of the charities' ability to speak, or a restriction of the professional fundraisers' ability to speak, the restriction is undoubtedly one on speech, and cannot be countenanced here.

[citations omitted]. *Id.* at 794. The law Petitioner urges this Court to review must be considered as a restriction on fully-protected speech.

II. THE UTAH LAW IS A CONTENT-BASED REGULATION OF SPEECH AS WELL AS A PRIOR RESTRAINT AND IS THEREFORE SUBJECT TO STRICT SCRUTINY.

A. THE UTAH LAW IMPOSES A CONTENT-BASED RESTRICTION ON SPEECH

By its terms, the Utah law affects only some charitable organizations, and it only affects some types of protected speech.

The Utah law defines "Professional fund raising counsel or consultant" as

> . . . a person who:
>
> (i) for compensation plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization, whether or not at any time the person has custody of contributions from a solicitation;
>
> (ii) does not solicit contributions; and
>
> (iii) does not employ, procure, or engage any compensated person to solicit or receive contributions.
>
> (b) "Professional fund raising counsel or consultant" does not include an attorney, investment counselor, or banker who in the conduct of that person's profession advises a client when actually engaged in the giving of legal, investment, or financial advice.

Utah Code Ann. § 13-22-2(11). Section 13-22-9 states that

> It is unlawful for any person or entity to act as a professional fundraiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division . . .

The Utah law is a content-based restriction on free speech for three reasons. First, it is content-based because it applies its restrictions only if the mail piece sent by a charity contains an appeal for public support. Charitable organizations which can afford to spread their message without appealing for public support may hire any professional advisors they choose. Second, Utah does not require advisors for commercial mailers to register and post bond if they advise for-profit businesses about their mail solicitations. Third, this provision of the Utah law affects only charities which hire professional advisors and, therefore, disproportionately affects smaller or less popular charities which may not have the resources to hire expert employees to produce the necessary materials in-house.

In *Riley, supra*, the Court examined a North Carolina statute which applied a disclosure, or a form of forced speech, requirements to charitable solicitations which were delivered through outside professionals but did not apply restrictions to solicitations delivered through volunteers or a charity's own employees. 487 U.S. at 795. The Court found that this restriction was content-based and therefore subject to strict scrutiny. *Id.* The Court held that restrictions on charitable solicitations which apply only

to charities which use professionals to aid in their appeals:

> necessarily discriminates against small or unpopular charities which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. Yet the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success.

Id. at 799.

The effect of the Utah law is identical: small or unpopular charities which are forced by economic necessities to use professionals to aid in their appeal must hire licensed professionals, only, and therefore pay higher fees than charities which can afford to produce the same solicitations in-house. The challenged provision, therefore, acts as a barrier to some smaller charities that cannot afford the additional cost. When any organization's protected speech is diminished, society as a whole is the loser.

B. THE UTAH LAW IMPOSES A PRIOR RESTRAINT ON PROTECTED SPEECH

The Utah law also prohibits certain organizations from speaking at all by prohibiting them from mailing solicitations into the state if their professional advisor is not registered. The bond and fee requirements of the law, further, establish an economic barrier to entry for this

class of speech. The law creates a prior restraint of speech through both of these mechanisms.

A consultant on notice that 40 states regulate charitable appeals will undoubtedly decide, in some cases, not to advise certain charities because to do so will expose the consultant to dozens of registrations, bonds and fees or risk criminal prosecution, e.g., Utah Code Ann. § 13-22-4(1). The *Riley* Court considered a law of similar application and noted:

> this chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately "reduc[e] the quantity of expression." *Buckley v. Valeo*, 424 U.S. 1, 19, 39 (1976).

Riley, 487 U.S. at 794. The lesson to be learned from *Riley* is that when certain consultants decide not to advise charities because of this overarching law, the small or unpopular charity as well as the public in general is the loser.

It is a fundamental tenet of First Amendment jurisprudence that prior restraints of protected speech are abhorrent to the Constitution and that they would be struck down in all cases but the most extreme, e.g., times of war or "fighting" words. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). This Court has also noted that: "any system of prior restraints of expression comes to this

court bearing a heavy presumption against its constitutional validity." *Freedman v. State of Maryland*, 380 U.S. 51, 57 (1965) *quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225 (1989).

Subsequent to *Near* and *Freedman*, the Supreme Court ruled that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment Rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976). Prior restraint of speech is allowed only if certain procedural safeguards are met. *Freedman*, 380 U.S. at 58. First, the burden of proving that future speech is unprotected lies on the censor. Second, the State cannot make a final decision regarding whether the speech may be silenced without a judicial determination in an adversarial proceeding that the speech is unprotected. *Id. See also Riley*, 487 U.S. at 802.

It is well settled that the government may not prospectively silence speech except in extremely limited circumstances. *Near*, 283 U.S. at 716. It is further a settled rule of constitutional jurisprudence that government may not do indirectly what it is forbidden from doing directly:

> [a]s we have often noted, " '[c]onstitutional rights would be of little value if they could be . . . indirectly denied.' " *Harman v. Forssenius*, 380 U.S. 528, 540 (1965), *quoting Smith v. Allwright*, 321 U.S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on Constitutional protections. *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *Harman v. Forssenius*, 380 U.S. at 540-541.

U.S. Term Limits v. Thornton, 115 S. Ct. 1842, 1867 (1995). Thus a statute could create a prior restraint by forbidding

speech directly or by creating a barrier to that speech such that some speakers are silenced.

The speech of a charity using a non-licensed consultant is no less fully-protected than any other organization. Because this system of prior restraint lacks this and other essential safeguards, it is unconstitutional.

C. THE UTAH LAW IS ONLY CONSTITUTIONAL IF IT CAN WITHSTAND STRICT SCRUTINY.

To withstand strict scrutiny, a statute must be narrowly tailored to further a defined, compelling interest which the state is entitled to protect. *Munson*, 467 U.S. at 959-60; *Schaumburg*, 444 U.S. at 636. Meeting this standard is a burden borne by the state. *See, e.g., Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 960-1; *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989). This Court also stated that the government has the ability to regulate the content of protected speech to further a compelling interest only if "it chooses the least restrictive means to further the articulated interest." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). The statute at issue fails this test.

The Utah law cannot meet this level of scrutiny because it is redundant and unrelated to any legitimate government purpose. The exceptions to the law, furthermore, weigh against any legitimate purpose the Respondent may claim for the law. *See Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 178 (1999) (In that case, this Court struck down a statute "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."). As set forth in

this Brief, the Utah law exempts several types of advisors from its registration requirements and exempts several types of speech, which may be more likely to be fraudulent.

The Utah law allows mail from commercial entities to be delivered with no equivalent licensure scheme. It also allows mail from charities who do not hire advisors. There is no more likelihood that Petitioner's mail would be fraudulent than these types of mail, and therefore the causal relationship between the Utah law and Respondent's asserted purpose fails.

III. THE APPELLATE COURT ERRED BY APPLYING AN INTERMEDIATE LEVEL OF SCRUTINY TO THE UTAH LAW.

The Tenth Circuit Court of Appeals ruled that the Utah law was content neutral and was therefore subject to an intermediate level of scrutiny. *American Target Advertising v. Francine Giani,* 2000 U.S. App. Lexis 429, 5 (10th Cir. 2000).

Application of this standard is a question of law, and as such is reviewed by this Court de novo. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 498-511 (1984). Given the fully-protected nature of charities' speech and the fact that this case is a facial challenge to the Utah law, this Court need not defer to the opinion of the appellate court and should consider the question de novo.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit Court of Appeals should be reversed in part and affirmed in part.

Respectfully submitted,

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APPENDIX

The National Federation of Nonprofits, Inc., is a trade group based in Washington, D.C. Since 1982 the National Federation of Nonprofits has been an aggressive and effective advocate for nonprofits in postal, regulatory, legislative, and accountability issues.

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No. 99-1647

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICAN TARGET ADVERTISING, INC.,

Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the registration requirements for professional fund raising consultants under Utah's Charitable Solicitations Act violate the First Amendment?

2. Do the registration requirements for professional fund raising consultants under Utah's Charitable Solicitations Act violate the Due Process Clause of the Fourteenth Amendment?

3. Do the registration requirements for professional fund raising consultants under Utah's Charitable Solicitations Act violate the Commerce Clause?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS

The decision of the United States Court of Appeals for the Tenth Circuit sought to be reviewed is reported at 199 F.3d 1241 (10th Cir. 2000) (reproduced in the Appendix to American Target's Petition, Cert. App. 1a). The judgment of the United States District Court for the District of Utah reviewed by the court of appeals is reported at 23 F.Supp.2d 1303 (D. Utah 1998) (Cert. App. 21a).

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals sought to be reviewed was entered on January 13, 2000. This Court has jurisdiction to review on a writ of certiorari the judgment of the United States Court of Appeals under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The constitutional provisions, statutes, and regulations that are relevant to a determination of this case are set forth below.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 to -21 (1953, as amended), is set out in the appendix to American Target's petition, Cert. App. 37a-63a.

Rule 152-22-4(3), promulgated by the Division under the Charitable Solicitations Act, provides:

> All initial applications and renewals of registration in accordance with Section 13-22-12(5) shall be processed within 10 business days of their receipt by the division.

STATEMENT OF THE CASE

Procedural Background

Pursuant to 28 U.S.C. 1331, American Target Advertising, Inc. filed an action in the United States District Court for the District of Utah against Francine A. Giani in her official capacity as Director of the Utah Division of Consumer Protection ("Division"). Cert. App. 1a; CA10 App. 2.[1] American Target sought damages under 42 U.S.C. § 1983, various injunctive relief, and a judgment from the district court

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[1]Matters found in the Appendix filed in the Tenth Circuit are cited as "CA10 App." followed by the appendix page number.

under 28 U.S.C. § 2201 declaring the Utah Charitable Solicitations Act unconstitutional. Cert. App. 1a-2a; CA10 App. 2. After the parties filed cross-motions for summary judgment, the district court granted the Director's motion and the action was dismissed. Cert. App. 1a-2a, 36a.

American Target timely appealed the judgment of the district court to the Tenth Circuit. Cert. App. 2a. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, the court of appeals affirmed the judgment in part and denied the judgment in part. Cert. App. 2a. The court rejected American Target's claims that the Act violates the Due Process Clause and Commerce Clause of the United States Constitution. Cert. App. 17a-20a. The court also held that all but three provisions of the Act comported with the First Amendment. Cert. App. 2a-17a. American Target timely filed a petition for writ of certiorari.

Fundraising by American Target

American Target is a Virginia corporation that provides fundraising services to various nonprofit organizations, including Judicial Watch, Inc, a "political watchdog" organization based in Washington, D.C. Cert. App. 2a, 23a. Judicial Watch retained the services of American Target to "build a national base of supporters across the country." CA10 App. 397-98.

Directing Fundraising. Under its agreement with Judicial Watch, American Target is generally responsible for all direct mail packages seeking financial contributions. CA10 App. 16. American Target consults and advises Judicial Watch regarding

its solicitations and other communications to the public. CA10 App. 16-17. American Target prepares the creative copy and design of mailings. CA10 App. 16-17. American Target acts as Judicial Watch's disclosed agent in acquiring production services relevant to direct mail solicitations, including the ordering of services and materials from vendors and suppliers. CA10 App. 16-17. Judicial Watch relies on American Target to select lists for potential donors and identify dates when mailings should occur. CA10 App. 16-17. Moreover, American Target is Judicial Watch's exclusive list broker for all solicitations performed under the agreement. CA10 App. 16-17.

Fees. American Target receives 8¢ for each direct mail solicitation in Utah and any other state and 7¢ for each newsletter or thank you letter. CA10 App. 19. American Target also receives $1.00 for every person that participates in a monthly giving program established by the parties up to $5,000.00 per month. CA10 App. 19. American Target receives 10¢ for each name rented by Judicial Watch from the "Agency Masterfile" other than those names developed under the agreement. CA10 App. 21. However, Judicial Watch is responsible for costs and expenses only to the extent sufficient contributions are received to cover those bills. CA10 App. 27.

Disbursement of Contributions. Payment for American Target's services is directly tied to contributions. CA10 App. 27. Contributions are not sent directly to Judicial Watch. Instead, contributors send donations to an escrow account administered by an agent and pursuant to an agreement approved by both American Target and Judicial Watch. CA10

App. 17. The escrow agent disburses funds, first, to American Target for cost advances, and second, to vendors and suppliers, including American Target, for the costs associated with the mailings. CA10 App. 17-18. A portion of what is left is held in reserve for future costs. CA10 App. 17-18. Only then, after the payment of advances, costs, and fees, and the reservation of money for future costs, are any remaining funds disbursed to Judicial Watch. CA10 App. 17-18.

Utah Charitable Solicitations Act

The Utah Charitable Solicitations Act requires registration of professional fundraisers and consultants (collectively referred to as "fundraising professionals") who provide fundraising services in connection with solicitations in Utah. Utah Code Ann. § 13-22-5. The Act requires professional fundraisers and consultants to submit to the Division an application, together with a $250 registration fee, before solicitation begins.[2] Utah Code Ann. § 13-22-9.

In its application, the consultant must disclose:

> (1) simple identifying information about the consultant, its officers, directors, registered agent, and affiliates (e.g., name, address, telephone number, facsimile number, and the type of entity);

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[2]The Tenth Circuit held that the Act's bond provision violated the First Amendment. Cert. App. 7a-9a. The Director has filed a conditional cross-petition seeking review of that decision in the event this Court grant's American Target's petition.

(2) whether or not any injunction, judgment, administrative order, or criminal conviction involving moral turpitude has been entered against the consultant or against any of its officers, directors, managers, operators, or principals;

(3) the purpose of the consulting services, the intended use of the contributions solicited, the method by which the consulting services will be organized, and the projected length of time of the solicitation;

(4) the total fees charged by the consultant and the expenses the consultant anticipates it will incur for its services, including the payment of commissions, salaries, and collection costs;

(5) the projected percentage of contributions that will be available to the charity after the payment of expenses, including fees paid to the consultant; and

(6) certain historical information about the consultant, including the nature of the consultant's business during the preceding three years and the total net fees earned and expenditures made by the consultant in the previous calendar year.

Utah Code Ann. § 13-22-9(1)(b). In addition to the foregoing disclosures, the consultant is required to provide copies of various documents reflecting its status and its relationship with the charity, including organizational documents, its IRS tax exempt letter (if applicable), and contracts and other documents

pertaining to its relationship with the charity. Utah Code Ann. § 13-22-9(1)(b)(x) & (xii); Utah Admin. Code R152-22-4(2).

Registration by American Target and Judicial Watch

Although Judicial Watch is registered with the Division as a charity that solicits contributions from Utah residents, American Target has not registered as either a professional fundraiser or consultant. Cert. App. 2a, 23a-24a. Accordingly, Judicial Watch may not solicit contributions from Utah residents through American Target until and unless American Target registers with the Division. Utah Code Ann. § 13-22-6(1)(b)(xiv)(B); Cert. App. 2a.

Approximately twenty-nine professional fundraisers registered with the State during the 1994 fiscal year. CA10 App. 186-87. In 1997, ninety professional fundraisers and consultants registered with the State. CA10 App. 187.

PERCEIVED MISSTATEMENTS OF FACT OR LAW

American Target's Role in Fundraising

In its petition, American Target argues that the Act "regulates [American Target] solely because [it] gives advice and provides services to Judicial Watch to aid it in engaging in this highly protected form of speech." Cert. Pet. 11. American Target also claims that it "does no business in Utah, sends no letters into the state, and does not solicit Utah residents for funds." Cert. Pet. 2. American Target further characterizes its

involvement in fundraising as simply giving advice to its clients like Judicial Watch. *See* Cert. Pet. 3, 11.

American Target, however, does much more than counsel or give advice to Judicial Watch. Notwithstanding any language to the contrary, the agreement between American Target and Judicial Watch makes clear that American Target coordinates and directs the fundraising on behalf of Judicial Watch and is directly compensated from contributions. As found by the district court, under its contract with Judicial Watch, "American Target (1) prepares the creative copy and design of the mailings, (2) plans and manages the production services relevant to direct mail solicitations, (3) selects lists of potential donors and identifies dates when mailings should occur, and (4) generally advises Judicial Watch regarding the solicitations." App. 50 (*citing* section 1 of Agreement, CA10 App. 16-17). American Target is also Judicial Watch's exclusive list broker for all solicitations performed under the agreement. CA10 App. 16-17.

Moreover, American Target receives 8 cents for each direct mail solicitation in Utah and any other state and 7 cents for each newsletter or thank you letter. CA10 App. 19. Tellingly, however, Judicial Watch's obligation to American Target for these fees is directly tied to funds raised. Judicial Watch bears "no financial risk" under the contract. CA10 App. 27. Judicial Watch has an obligation to "pay" for American Target's services "only to the extent that money comes in from mailings under the [ ] contract or from contributors or other respondents developed under the [ ] contract." CA10 App. 27.

Finally, contributions raised by American Target are not sent directly to Judicial Watch, but instead are deposited into an escrow account managed by an escrow agent mutually selected by American Target and Judicial Watch. CA10App. 17. American Target is the first to receive funds from contributions. These contributions are *first* distributed to American Target for advances and fees and to vendors and suppliers secured by American Target for the production of the direct mail solicitations. CA10 App. 16-18. Then, after holding out an additional portion for future costs, the remaining contributions are disbursed to Judicial Watch. CA10 App. 17-18.

American Target is therefore much more than an "advice-giver" as it seems to characterize itself. *See* Cert. Pet. at 13. Rather, the burden to coordinate, direct, and manage fundraising for Judicial Watch rests with American Target. *See* CA10 App. 398.

American Target unwittingly acknowledges the extent of its fundraising role in its own petition, quoting one author's observation that American Target's predecessor "and its scores of imitators and spin-off firms have played a significant role in raising money to elect conservative candidates." Cert. Pet. 10, n. 7. Indeed, Richard Viguerie, American Target's chairman and founder, is regarded as having "virtually invented an industry–political fundraising through direct mail." *About the publisher: Richard Viguerie*, New Media News Corp.(visited May 5, 2000) <http://www.newmediareport.com/rbio.shtml>.[3]

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[3]Viguerie did so in the 1960s "by creating the first political direct mail lists by hand (he copied registered voters names and addresses from little-

Application of the Act

In its petition, American Target asserts that the Act "directly targets the First Amendment activities of advice-giving and direct mail expression." *See* Cert. Pet. at 11, 13.[4] This claim is without merit.

The Act is not triggered by the mere mailing of informative or persuasive literature into Utah. The registration requirements for fundraising professionals are triggered ***only if*** the charity, through its fundraising professional, ***solicits contributions in Utah***. Utah Code Ann. § 13-22-5. No registration is required if American Target simply mails letters into Utah on behalf of its client charity—whether the letters address social, religious, or political topics, and whether their purpose is to inform or persuade. The Act, therefore, is not a mere attempt by the State to license core political speech as suggested by American Target, but rather a means to regulate those who participate in soliciting charitable contributions from Utah residents.

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known public sources, then resold these lists thousands of times to political candidates to build a multi-million dollar political fundraising business)." *Id.*

[4] In its due process claim, American Target also incorrectly asserts that "the trigger for regulation is that those entities engage in core political activities protected by the First Amendment." Cert. Pet. at 19.

REASONS FOR DENYING THE PETITION

"A petition for a writ of certiorari will be granted only for compelling reasons." S.Ct. R. 10. American Target has not demonstrated that the decision of the court of appeals conflicts with the decision of another court of appeals on the same issue. *See* S.Ct. R. 10(a). American Target has also failed to establish that the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. R. 10(c). Nor has American Target established any other compelling reason for this Court to grant its petition. Accordingly, American Target's petition should be denied.

I. American Target Has Shown No Compelling Reason for this Court to Review the Tenth Circuit's Correct Holding That the Act Comports with the First Amendment.

The focus of American Target's petition is the Tenth Circuit's decision upholding as constitutional under the First Amendment all but three provisions of the Act. However, American Target fails to demonstrate that the court of appeals departed from this Court's First Amendment decisions. Nor has American Target demonstrated that the law is otherwise unsettled. Accordingly, the petition should be denied.[5]

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[5] American Target has throughout this litigation only argued that the Act burdens its client's free speech rights. It has not, until now, Cert. Pet. at 9-13, seriously argued that its own First Amendment rights were violated.

A. The Registration Requirements for Fundraising Consultants Are Content-Neutral.

American Target argues that the court of appeals erroneously concluded that the Act was content neutral, contending that the Act applies to it "only because of the content of [its] advice and of the speech of [its] clients." Cert. Pet. at 14. However, American Target does not even attempt to explain this position, jumping instead to its claim that the court of appeals should nevertheless have applied strict scrutiny. Cert. Pet. at 14-15. Therefore, American Target has failed to demonstrate any reason for this Court to review the Tenth Circuit's conclusion that the Act is content neutral.

In any case, however, American Target's claim that the Act is a content-based regulation lacks merit. The Act applies to all fund raising consultants who direct and coordinate solicitations in Utah, regardless of the content of the speech. The Act has nothing to do with the underlying messages or causes for which the solicitations are being made, but rather focuses on ensuring forthright, honest, and verifiable representations in the solicitation process. Thus, registration is required whether the

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Accordingly, because American Target's First Amendment interests have neither been adequately raised or argued below, nor decided upon by the Tenth Circuit, review should not be granted on that issue. *See Powell v. Nevada*, 511 U.S. 79, 85 fn. (1994) (refusing to address a claim "[b]ecause the issue was not raised, argued, or decided below"). Indeed, regulations governing American Target's First Amendment rights with respect to its business relationships would be examined under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

solicitations seek financial support for Al Gore's presidential campaign or George W. Bush's campaign. The content has nothing to do with application of the Act or its purpose.

This Court has long held that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (*citing City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 47-48 (1986)). The court of appeals correctly observed that the Act "targets the secondary effects of professional solicitations, i.e., increased fraud and misrepresentation." Cert. App. 4a. The express purpose of the Act, and of all other laws in Title 13, is "to protect [Utah] citizens from harmful and injurious acts by persons offering or providing essential or necessary goods or services to the general public." *See* Utah Code Ann. § 13-1-1. The Act itself is replete with provisions designed to protect both the pubic and charities against fraud, breach of fiduciary duty, and misrepresentations. *See* Utah Code Ann. §§ 13-22-12(1)(b) (i), (ii), and (v); Utah Code Ann. § 13-22-13(3).

In short, the justifications for Utah's registration requirements have nothing to do with content, i.e., the desire to protect the public (and charities) from fraud has nothing to do with the actual literature being sent to Utah residents. *See Boos v. Barry*, 485 U.S. 312, 320 (1988). As such, the Act was properly analyzed by the court of appeals as content neutral.

B. As a Content-Neutral Regulation, the Registration Requirements Are Subject to Intermediate Scrutiny.

American Target suggests that strict scrutiny applies simply because core political speech may be implicated. Cert. Pet. at 8, 15. In a closely-related argument, American Target argues that the First Amendment requires the State to choose the least restrictive means to further its interest because the Act does not regulate the time, place, or manner of the speech. Cert. Pet. at 8, 13. However, these arguments ignore well-settled First Amendment jurisprudence. Following this Court's precedents, the court of appeals correctly applied intermediate scrutiny to Utah's content-neutral regulation.

In *Turner Broadcasting Systems, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994), this Court held that content-neutral regulations "are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." 512 U.S. at 642. Accordingly, in *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989), the Court observed that it "ha[s] refrained from imposing a least-restrictive-means requirement—even where core political speech is at issue—in assessing the validity of so-called time, place, and manner regulations." The Court continued:

> Similarly with respect to government regulation of expressive conduct, ***including conduct expressive of political views***. In requiring that to be "narrowly tailored" to serve an important or substantial state

> interest, [the Supreme Court] ha[s] not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interests."

Fox, 492 U.S. at 478 (citations omitted) (emphasis added). As such, whether the Act regulates the "time, place, or manner" of speech, or has an incidental impact on speech, intermediate scrutiny applies and the State need only establish that the regulation (1) serves a legitimate or substantial state interest, and (2) is narrowly tailored to that interest. *Ward*, 491 U.S. at 798.

That intermediate scrutiny is the appropriate standard by which the Act should be reviewed is evident from this Court's decision in *Riley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). In reviewing a North Carolina provision that prohibited professional fundraisers from retaining an unreasonable or excessive fee, the Court held that the state's "interest in protecting charities (and the public) from fraud . . . is a sufficiently substantial interest to justify a narrowly tailored regulation." 487 U.S. at 792. The Court, therefore, used the intermediate standard in its review of the fee requirement. In that same case, however, the Court applied strict scrutiny to the North Carolina requirement that fundraisers disclose to the potential donor, before an appeal for funds, the percentage of contributions that would be turned over to the charity. The Court held that because it mandated speech, it was a "content-based regulation [ ] subject to exacting First Amendment scrutiny." *Id.* at 798.

As a content-neutral regulation, therefore, the Act was properly reviewed by the court of appeals under an intermediate scrutiny standard.

C. The Registration Requirements Are Narrowly Tailored to the State's Legitimate and Substantial Interest in Protecting the Public and Charities from Fraud.

This Court has been "loathe to second-guess the Government's judgment" regarding the extent of regulation necessary to further its content-neutral interest. *Id.* "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799. The court of appeals correctly concluded that the registration requirements meet that test.

In its petition, American Target in essence asks this Court to strike regulations that have any impact on political expression, regardless of the purpose of the regulation. As discussed above, this is not the law. Thus, in *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980), this Court held that although charitable appeals implicate a variety of speech interests that are protected by the First Amendment, "[s]oliciting financial support is undoubtedly subject to reasonable regulation."

American Target cites this Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988), for the proposition that because political expression is involved, the State's distinction between

paid consultants and unpaid consultants violates the First Amendment. Cert. Pet. at 12-13. American Target, however, did not challenge this distinction below nor did the court of appeals otherwise address the distinction. *See* Cert. App. 1a-20a. Accordingly, review on this issue is not appropriate. *See Powell*, 511 U.S. at 85 fn. In any event, however, *Meyer* involved Colorado's prohibition against paying circulators of initiative or referendum petitions. *Meyer*, 486 U.S. at 417. In invalidating the statute, the Supreme Court concluded that Colorado's "interest in protecting the integrity of the initiative process" did not justify the absolute prohibition. *Id.* at 426. The Utah Act does not ban the use of fund raising consultants, but only requires that they register.

This Court has on at least two occasions indicated that registration requirements are consistent with the First Amendment.

Schaumberg. In *Schaumberg*, the Court reviewed an ordinance requiring that at least 75 percent of the proceeds from charitable solicitations be directly used for the charitable purpose. *Schaumberg*, 444 U.S. at 625. Any solicitor who did not so demonstrate could not receive a permit. *Id.* The regulation, therefore, directly dictated *how* proceeds should be used. In striking the regulation, the Court rejected the underlying premise of the regulation: that "any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not charitable, but a commercial, for profit enterprise and that to permit it to represent itself as a charity is fraudulent." *Id.* at 636.

The Court concluded that "[t]he Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation." The Court then proceeded to list measures that would withstand constitutional scrutiny:

> Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. ***Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.*** Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

Id. at 637-38 (citations and footnotes omitted) (emphasis added). In discussing efforts to promote disclosure, the Court cited to Illinois law requiring charitable organizations to register and "report certain information about their structure and fundraising activities." *Id.* at 638 n. 12.

Riley. In *Riley*, this Court once again acknowledged the propriety of registration and disclosure requirements. In striking North Carolina's point-of-solicitation disclosure requirement, the Court stated that its holding "did not suggest that States must sit idly by and allow their citizens to be defrauded." *Riley*, 487 U.S. at 795. The Court observed that in addition to enforcing antifraud laws, "North Carolina may constitutionally require fundraisers to disclose certain financial

information to the State, as it has since 1981." *Id.* The Court further observed that the State could then publish these "detailed financial disclosure forms" so the public could receive the desired information "without burdening a speaker with unwanted speech during the course of a solicitation." *Id.* at 800.

The Utah Act provides for just such disclosures to further Utah's legitimate and substantial interest in protecting both the public and charities from fraud. Cert. App. 4a-5a (*citing Riley*, 487 U.S. at 792). Accordingly, the Tenth Circuit's decision upholding the registration and disclosure requirements is in keeping with this Court's decisions in *Riley* and *Schaumberg*.

D. The Registration Requirements Comport With This Court's Prior Restraint Decisions.

American Target also claims that the Act is a prior restraint subject to a least-restrictive-means analysis. Cert. Pet. at 13-14. American Target, however, cites to no authority supporting such a conclusion. Prior restraints, as the court of appeals properly observed, are governed by this Court's decision in *Freedman v. Maryland*, 380 U.S. 51 (1965), and its progeny. *See* Cert. App. 16a. American Target correctly observes that although the Act imposes no deadline within which the Division must act on an application, rules promulgated by the Division have imposed such a deadline (10 days). The court of appeals concluded that the 10-day deadline was consistent with *Freedman*. Cert. App. 16a-17a. American Target has not cited any authority to the contrary nor has it even argued that the 10-day time limit is insufficient. Indeed, Utah's 10-day limit

appears to satisfy the concerns expressed by this Court in *Riley*. *See Riley*, 487 U.S. at 801-02 (striking North Carolina's licensing requirement because it failed to impose any time limit on the State's determination of a license application).

American Target also complains that review of the Division's decision on an application carries no deadline or other procedural safeguard. Cert. Pet. at 14. That issue, however, was not raised, argued, or otherwise decided below. Accordingly, this Court should not address it now for the first time on certiorari review. *See Powell*, 511 U.S. at 85 fn.[6]

II. American Target Has Shown No Compelling Reason for this Court to Review the Tenth Circuit's Correct Conclusion That the Act Comports with the Due Process Clause.

In its due process claim, American Target once again urges this Court to grant certiorari review based on an erroneous premise—that regulation of American Target is triggered by the exercise of First Amendment rights. *See* Cert. Pet. at 19-20. As discussed above, however, regulation is not triggered by the mere exercise of First Amendment freedoms, but by the solicitation of contributions from Utah residents. *See* Utah Code Ann. § 13-22-5(4).

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[6]Contrary to American Target's claim, the court of appeals did not address the application of *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), because American Target's "stray references" to the issue of judicial review in prior restraint cases were "insufficient to trigger appellate review." Cert. App. 16a, n. 7.

American Target hopes to hide behind the facade of a cleverly worded agreement, but in the end, even the agreement exposes American Target's true role in fundraising. American Target manages and directs the fundraising for Judicial Watch. As explained above, American Target prepares the creative copy and design for the mailings, plans and manages the production services relevant to direct mail solicitations, selects potential donors to whom mailings will be sent, and identifies the optimum mailing dates. *See* CA10 App. 16-17; Cert. App. 20a. In short, the burden of fundraising rests with American Target upon whose expertise Judicial Watch relies for successful solicitation campaigns. *See* CA10 App. 398.

Of even greater significance, however, is that American Target's efforts are purposefully directed toward Utah residents whom American Target identifies as sympathetic to the cause of its client and who are therefore more likely to contribute.[7] *See Burger King Corp. v. Rudeicz*, 471 U.S. 462, 476 (1985) (holding that "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction"). Thus, for every letter sent into Utah, American Target receives a portion of the contribution made. *See* CA10 App. 19 (receiving 8 cents for each direct mail solicitation and 7 cents for each newsletter

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[7]This case comes to the Court in the context of an action seeking a declaratory judgment after Judicial Watch notified the State of its intent to solicit contributions in Utah through American Target. Cert. App. 23a-24a. However, because American Target had not registered with the State, it was precluded from pursuing its solicitation campaign for Judicial Watch. *Id.* Accordingly, no solicitations have apparently been made in Utah to date.

or thank you letter). Moreover, American Target is the first to receive moneys from contributions. *See* CA10 App. 17-18.

American Target asks this Court to draw a distinction between "adjudicative" and "legislative" jurisdiction, yet can cite to no precedent from this Court that would support the departure it seeks. *See* Cert. Pet. at 20. Instead, American Target cites to Justice Scalia's concurrence in *Quill Corp. v. North Dakota*, 504 U.S. 298, 319-20 (1992) (Scalia, J., concurring), that "the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are [not] necessarily identical." Cert. Pet. at 20. However, American Target offers no insight on how the two should be treated differently. Moreover, it was in *Quill*—a case involving the state's jurisdiction to tax out-of-state entities—where this Court concluded "that if a foreign corporation avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's in personam jurisdiction even if it has no physical presence in the State." *Quill*, 504 U.S. at 307. In its opinion, joined by Justice Scalia, the Court held:

> In "modern commercial life" it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule

those holdings as superseded by developments in the law of due process.

Id. at 308. Because American Target will purposefully direct its solicitation efforts toward the residents of Utah, thereby availing itself of the benefits of the economic market in Utah, the court of appeals correctly concluded that American Target's activities are sufficient to subject it to the State's regulatory jurisdiction.

III. American Target Has Shown No Compelling Reason for this Court to Review the Tenth Circuit's Correct Conclusion That the Act Comports with the Commerce Clause.

Finally, American Target seeks review of the Tenth Circuit's decision that the Act does not violate the Commerce Clause. Cert. Pet. at 16. Again, American Target's claim rests largely on the fact that it is located in Virginia and has no employees in Utah. However, as explained above, American Target purposefully directs its solicitation efforts toward Utah residents whom it identifies as sympathetic to its client's cause and who are therefore likely to contribute.

American Target cites to this Court's decisions in *Quill* and *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), for the proposition that the State may not regulate an out-of-state professional fund raising consultant whose only contact with Utah residents is through direct mail solicitations. Cert. Pet. at 18-19. As the court of appeals correctly observed, however, both *Quill* and *Bellas Hess* addressed a state's ability

to ***tax*** interstate commerce. *See* Cert. App. 18a-19a.[8] What this Court established in *Bellas Hess*, and reaffirmed in *Quill*, is "a bright-line rule in the area of sales and use taxes" only. *Quill*, 504 U.S. at 316. It extends no further.

The Utah Act regulates charitable solicitations; it is undisputably not a taxing statute and American Target does not claim otherwise. Accordingly, the *Bellas Hess/Quill* bright-line rule does not apply. Under that bright-line rule, the Commerce Clause prohibits a state from imposing sales and use taxes on a vendor whose only contacts with the taxing state are by mail or common carrier. *Id.* at 311-13. The Court expressly acknowledged in *Quill* the limited application of the bright-line rule, observing that it has "not adopted a similar bright-line, physical-presence requirement" in other types of Commerce Clause cases. *Id.* at 317. American Target has failed to cite to any authority extending that rule. Accordingly, the court of appeals properly rejected American Target's offer to impose the bright-line rule in this case.

As the court of appeals correctly observed, "[t]he Utah Act plainly does not distinguish between in-state and out-of-state businesses." Cert. App. 17a. In-state and out-of-state consultants alike are required to comply with the registration requirements. As discussed above, these registration requirements promote the State's legitimate and substantial interest in protecting both the public and charities from fraud

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[8]Both cases involved the state's attempt to require an out-of-state mail order house to collect and pay a use tax on goods purchased for use within the state. *Quill*, 504 U.S. at 301; *Bellas Hess*, 386 U.S. at 753.

and other harmful or injurious acts. Accordingly, the court of appeals correctly analyzed the Act under the principles set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

In *Pike*, this Court held that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. American Target has wholly failed to demonstrate how registration is "clearly excessive" to the benefits derived therefrom.

Registration entails the completion of a relatively simple 12-page application which, among other things, requires the consultant to: (1) identify the company and its managing personnel, (2) reveal adverse actions taken against them, (3) explain the company's history, function, and solicitation campaign plan, and (4) outline the expected costs and fees, as well as the percentage the charity is projected to receive. CA10 App. 190-201; *see* Utah Code Ann. § 13-22-9(1)(b). In addition, a $250 fee is assessed to defray the costs of administering the Act. Cert. App. 7a. This hardly represents a burden on interstate commerce.

On the other hand, the benefits of registration cannot be understated. In a day when many if not most of these solicitations originate hundreds if not thousands of miles away, making it difficult if not impossible to verify the legitimacy of the solicitation, the residents of Utah reap great benefits from registration. Through registration, residents are able to verify

representations made and ensure that their contributions are being used as represented. This benefit becomes apparent upon a simple review of the "product" or "good." In a commercial transaction, consumers can readily verify whether or not they have been defrauded by an examination of the product itself. However, upon making a charitable contribution, donors will likely never know whether or not their donation was actually used for the intended purpose. The risk of fraud and misrepresentation is much greater in this setting. Without registration requirements, Utahns are powerless to make informed decisions and protect themselves against fraud.

In short, American Target has failed to show any reason, much less a compelling reason, why this Court should review the court of appeals' decision that the Act does not violate the Commerce Clause.

CONCLUSION

For the reasons stated above, the Director requests the Court to deny American Target's Petition for Writ of Certiorari.

Respectfully submitted this 12nd day of May, 2000,

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No. 99-1647

IN THE
Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF BRUCE W. EBERLE & ASSOCIATES, INC. AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Bruce W. Eberle and Associates, Inc., ("Eberle") is a fund raising consultant located in Virginia. Since 1974, it has served nonprofits and other organizations that communicate with the public through the United States mail. Southeastern Legal Foundation ("SLF"), established in 1976, is a nonprofit organization located in Georgia. It is a public interest law firm that relies on public support to finance its operations. Eberle and SLF support the Petitioner's efforts in this litigation to resist ongoing actions by Utah and other jurisdictions that impede free speech rights by imposing registration requirements, regulations, fees and bonds on out-of-state fund raising consultants and their clients. Eberle and SLF operate solely from their offices in Fairfax, Virginia, and Atlanta, Georgia, respectively. Their only "contact" with Utah is the letters that SLF or other Eberle clients send through the United States mail.[1] Eberle and SLF have a direct interest in the issue involved, *i.e.*, whether states such as Utah can bar a Virginia corporation such as Eberle from consulting in the preparation of a client's direct mail letters unless Eberle meets registration requirements and pays fees to a foreign state.

Eberle has an ongoing appeal concerning a citation issued by Utah under the same Utah act challenged by the Petitioner in the present case. Utah and Eberle have agreed to continue that appeal pending the resolution of this case. That litigation involves a letter that SLF mailed nationally after consulting with Eberle in 1997. Eberle has previously filed *amicus curiae* briefs in ATA v. Giani at trial before the United States District Court

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief. *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

for the District of Utah and for the appeal heard by the U.S. Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

The question in this case is whether Utah's imposition of licensing and regulatory requirements on fund raising consultants and their clients who are located in foreign states is a violation of the First Amendment, the Commerce Clause and the Due Process Clause. Eberle and SLF support American Target Advertising, Inc's ("ATA") position that the regulatory requirements are unconstitutional. The court of appeals held that Utah's requirement that a fund raising consultant submit a $25,000 bond prior to consulting with a client from its offices in Virginia was a violation of the First Amendment. The court of appeals also held that granting broad discretion to the director of Utah's Division of Consumer Protection to approve or to deny licenses to fund raising consultants was unconstitutional. However, the court of appeals upheld Utah's remaining registration requirements and the fees for out-of-state fund raising consultants. Eberle and SLF support ATA's position that the latter ruling was erroneous.

First, the court applied the wrong constitutional test for a First Amendment issue as important as direct communication between citizens through the United States mail. The court mistakenly applied the intermediate scrutiny standard of review rather than that of strict scrutiny despite prior cases involving charitable solicitations that used a more "exacting" standard. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State v. Joseph H. Munson Company, Inc., 467 U.S. 947 (1984); Riley v. Federation of the Blind, 487 U.S. 781 (1988). The court also did not fully take into account the chilling effect that the Act can have on parties who, based only on mailing a letter, are suddenly confronted with threats of felony violations from a foreign state. Reno v.

ACLU, 521 U.S. No.96511; 117 S.Ct. 2329; 138 L.Ed.2d 874 (1997).

The courts failed to appropriately analyze the immense degree to which regulations such as Utah's interfere with and block the ability of citizens to exercise their First Amendment rights. Schaumburg, 444 U.S. 620. Regulations similar to Utah's have been enacted in the majority of states and many localities. Currently, 42 states have some form of charitable registration laws. Some counties and municipalities also have such laws, which create prior restraints on the rights of nonprofit organizations to use the United States mail to communicate with citizens. (See amicus briefs filed by the states in the courts below.) The cumulative, detrimental effect of nationwide jurisdiction by jurisdiction registration for a fund raising consultant and its clients using direct mail is staggering and prevents some nonprofits from using one of the most effective means of communicating about political and social issues.

Many organizations cannot possibly afford legal staffs to keep up with statutes, amendments and regulations continuously being enacted by an endless multitude of foreign jurisdictions. Many nonprofits are small organizations that are supported largely by volunteer staff. Because of the registration demands, these small nonprofits must spend thousands of additional dollars to register themselves and pay higher fund raising costs so that their fund raising consultants can also comply with the myriad of state requirements. States are forcing small nonprofits to spend thousands of dollars before they can communicate with the public through direct mail. These expenditures are required at a time when, as shown by a nonprofit's initial decision to raise funds, many nonprofits clearly do not have the money to pay the expenses of registration across the country.

The court of appeals erred in denying that the Act places an undue burden on interstate commerce and violates the Commerce Clause. The cumulative burden of the registration, the fees, the compliance costs, the inevitable fines, a designation as a "felon," and the legal costs severely burden any out-of-state fund raising consultant. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). The court also erred in classifying fund raising consultants as "solicitors." Eberle and others who fit Utah's definition of a "professional fund raising consultant" do not solicit or have custody of any funds raised. Utah's statute has different requirements for "professional fund raisers" who actually do solicit within the state of Utah. The court confused the two classes which indicates that the analysis of the infringement upon constitutionally protected speech was erroneous.

The court also erred in its ruling that the Act did not violate the Due Process Clause of the Fourteenth Amendment. Eberle is a Virginia corporation with its offices in Fairfax, Virginia. It does not have any clients in Utah. Utah's basis for jurisdiction is that Eberle's clients send out letters that may reach Utah citizens. Eberle does not solicit funds in Utah nor conduct any activities there. Thus, it does not have the requisite "minimum contacts" with Utah to fall under the state's jurisdiction for registration and disclosure requirements. International Shoe v. Washington, 326 U.S. 310 (1945). Departure from this standard would mean that consultants in any field could be required to register to do business in a state only because it has a client that arguably has contacts there.

ARGUMENT

INTRODUCTION

Bruce W. Eberle & Associates, Inc. was founded in Fairfax, Virginia, in 1974 and is one of the nation's oldest direct mail fund raising consultants. Eberle has consulted with candidates

on presidential and congressional campaigns as well as for nonprofit 501(c)(3) and 501(c)(4) organizations. Eberle's sister corporation, Fund Raising Strategies, Inc., has also provided similar services to nonprofit organizations. Their clients, such as SLF, have advocated diverse causes such as veteran issues, challenges to government positions on prominent social issues, constitutional issues, wildlife concerns, and many other political and social issues that have been at the forefront of public discussion and debate over the past 25 years.

Like ATA, Eberle provides consulting services to its clients who endeavor to communicate with the public through the U.S. mail. Eberle's clients such as SLF send out information, newsletters, and letters to the general public. These materials commonly include surveys and petitions. They also include requests for support or donations from the public. For decades, nonprofit organizations have used the services of Eberle or others such as ATA to help them communicate through the mail and build effective support to help them advance their causes. This type of communication, made directly from the speaker to the citizen concerning vital public issues, is core political speech that is at the heart of the First Amendment. For example, SLF, using support raised in part from Eberle's services, successfully challenged the Census Bureau's plans to use statistical sampling for the census.[2]

However, since the early 1990's, Eberle, its clients and SLF have suddenly come under an avalanche of state registration requirements. States have adopted various versions of each other's acts, and each has enacted separate registration

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[2] SLF has supported litigants in cases concerning major issues that have previously been before the Court, e.g., the challenge of statistical sampling by the Census Bureau in Clinton v. Glavin, which was heard by the Court as a consolidated case in Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

requirements and fees. Each state requires similar information but the cumulative burden of the fees, bonds and citations has become a serious problem and threatens the ability of nonprofit organizations to disseminate their views as well as the ability of fund raising consultants to assist clients in direct mail. Further, while some states are willing just to accept the applications and fees, others now have claimed the authority to renegotiate or manage an out-of-state fund raising consultant's contractual relationships with its clients.

The cumulative effect of the varying registration requirements of the 42 states and the additional localities is staggering. The paperwork and financial demands of filing each registration with the fee and bond are endless. Virtually no fund raising client can walk the minefield of this number of varying regulations without violating some state's provision or deadline. Accordingly, a state official now has the authority to silence the views of a nonprofit organization with the ever present threat of a minor registration violation. For a fund raising consultant or its clients, the risk increases exponentially because the fund raising consultant may lose its license if *a client* violates a registration requirement. If one of Eberle's clients does not meet any part of a state's registration requirements, Eberle's other clients can have their mail blocked because Eberle's own license is now in jeopardy. This was actually the case with Eberle and SLF where SLF, a Georgia corporation, did not know about Utah's registration requirements and Utah cited both Eberle and SLF for that violation.

In the past few years, Eberle has been besieged by registration requirements from states such as Utah that it has no contact with other than its client sending a letter. These requirements have inhibited Eberle's ability to consult with its clients and pose a severe threat to the rights guaranteed by the First Amendment, the Commerce Clause and the Due Process Clause. For example, in the past three months alone, Eberle,

which has attempted to comply with registration requirements when possible, has had its clients' mailings stopped, threatened or delayed solely because of potential violations of registration requirements by Pennsylvania, North Carolina, Utah, Florida, New York, Tennessee, California, Michigan, Minnesota and New Jersey. Each of these actions by the states, which directly threatened and interfered with the capability of Eberle's clients to communicate with the 116.4 million total residents of those states, occurred entirely because of Eberle's or Eberle's clients difficulties in complying with the labyrinth of state registration requirements.[3] None of these barriers resulted from allegations of wrongdoing or fraud on the part of Eberle or its clients. States, however, issued cease and desist orders and fines of thousands of dollars for failure to keep up with the registration paperwork. The states' imminent threat of civil and criminal penalties for simple paperwork violations is forcing the abandonment of the right to communicate through the mail.

The burdens of the state registration requirements and their enforcement are clearly not de minimus, as is frequently argued by the states. Despite the fact that the only "illegal" act was the sending of a letter, Eberle's clients have been barred from or threatened with being barred from access to states which represent almost half of the entire United States population within the past three months. These actions by states clearly have a chilling effect on free speech. The following will describe such situations, including those under Utah's Act, that Eberle and SLF have faced which have either barred or significantly hindered constitutional rights to communicate with the public.

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[3] Population figures based on U.S. Census Bureau estimates of July 1, 1999 for Utah, Pennsylvania, New York, New Jersey, Florida, California, North Carolina, Tennessee, Michigan and Minnesota.

I. THE COURTS BELOW DID NOT PROPERLY CONSIDER THE CHILLING AND BURDENSOME EFFECT OF UTAH'S ACT AND ITS ENFORCEMENT.

A. Utah Aggressively Enforces Its Act With Citations, Hearings and Fines for the Sending of a Letter.

Utah is aggressively and unconstitutionally enforcing the Act. For the simple act of mailing a letter, Eberle and SLF were threatened with felony violations by a foreign state. On June 17, 1997, Utah alleged that Eberle violated the Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 *et seq.*, by providing consulting services to SLF in regard to SLF's direct mail fund raising program. Under Eberle's agreement with SLF, Eberle provides consulting services for SLF's direct mail fund raising program, helps to prepare draft copy for SLF's review and approval, and counsels SLF on mailing lists and agreements with vendors.

In attempting to comply with the Act, Eberle had registered in Utah as a professional fund raising consultant in October of 1996. In an unrelated act, Eberle later contracted with SLF on November 1, 1996. SLF conducted a national campaign by mailing its letters containing information about its programs, survey questions for the recipients, and charitable appeals for funds. On June 6, 1997, Sandra Redhage, Secretary of Eberle, received a fax from Utah stating that a letter from SLF, which was not registered, had been received within Utah and Utah did not have a copy of the Eberle - SLF agreement. After communicating with the Division by telephone, Ms. Redhage immediately forwarded Utah the contract, which was received by the state on June 13, 1997. Meanwhile, SLF, which had not been aware of Utah's registration requirements until notified by Utah, immediately proceeded to register with the state.

B. Criminal Violations

Nevertheless, despite these immediate attempts to comply with Utah's demands (which the state has acknowledged were made), Utah issued its citation to Eberle on June 17, 1997, alleging the following violations: 1) Eberle's client, SLF, which was not registered in Utah at the time, mailed certain communications into the state; and 2) Eberle did not submit its contract with SLF to Utah within thirty (30) days of its execution as directed by Utah Code Ann. §13-22-9(2). (Some other states that request contracts require them to be submitted at the time of the next yearly registration renewal.) For violations of the statute, Eberle is subject to the criminal penalties set forth by Utah for Class B misdemeanors. However, the citation noted that, *if Eberle did not demand a hearing within 10 days to contest the allegations, a cease and desist order would be entered against Eberle. After entry of such an order, Eberle would be subject to prosecution for a third degree felony if Eberle's clients, after receiving consulting services from Eberle, mailed into Utah.* SLF was served with a similar citation for not having registered.

C. Despite Eberle's and SLF's Efforts to Comply, Both Were Forced to Have Hearings.

Because of the above, Eberle and SLF were forced to request a hearing to preserve the ability of SLF or Eberle's other clients to mail into Utah. After a continuance, separate telephonic hearings were held on July 31, 1997. Mark Kleinfield, an employee of the Utah Division and the Enforcement Counsel for the case, also served as the administrator, the prosecutor and the "judge" for the hearings.

At Eberle's hearing, Mr. Kleinfield informed the defendants that it would be an informal, administrative proceeding. It was directed by the "judge," who would later make a

recommendation on the case to the Division Director. The judge himself asked leading questions to the state's own witnesses and dismissed the validity of the constitutional arguments presented by Eberle. For example, at the hearing and through its brief filed with the Division, Eberle argued that the statute violated the First Amendment, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment. When presented with these arguments, Mr. Kleinfeld stated that Eberle had waived its right to challenge the constitutionality of the statute by registering with the state as a fund raising consultant. The state asserted, basically, that a party forfeits its constitutional rights when it is forced to apply for a license by a foreign state. Such an unreasonable argument attests that an individual who obtains his driver's license would thus forever waive his right to contest the constitutionality of a motor vehicle statute.

On November 20, 1997, the Division issued an Order which denied Eberle's constitutional arguments, fined Eberle $1,000.00 for the previously stated violations of the Act, and suspended the penalty. The Order also stated that Eberle must "cease and desist operating in violation of" the Utah Charitable Solicitations Act. <u>According to earlier notices sent by Utah, a violation of Utah's cease and desist order would be a third degree felony.</u> Eberle then filed an administrative appeal to the Executive Director of the Division of Commerce.

Although his own Division had specifically addressed and rejected Eberle's constitutional arguments, the Executive Director stated he did not have jurisdiction over the constitutional issues and, without any further consideration, *dismissed* Eberle's appeal. Eberle has now appealed the matter to the state's district court. The appeal has been continued pending final resolution of this case.

D. Continuing Threat of Felonies

Having been presented with a scenario where Utah could impose a third degree felony against Eberle when Eberle or its clients are unaware of a paperwork deadline in a foreign state, Eberle's clients have not mailed to Utah citizens since 1997. Eberle's clients have been denied access to communicating with Utah citizens directly because of the Act and Utah's corresponding threats of felonies. This threat unconstitutionally silences those who now risk criminal penalities only for participating in the public discourse. Reno v. ACLU, 521 U.S. No.96511; Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).

II. THE COURTS BELOW SHOULD HAVE CONSIDERED THE CUMULATIVE EFFECT OF OTHER JURISDICTIONS IMPOSING SIMILAR RESTRAINTS ON MAIL COMMUNICATIONS.

As stated above, Eberle, which has attempted to register where it has been required, has been contacted and threatened by states that represent 116.4 million people solely because of registration issues in the past three months alone. Any alleged registration infraction, by Eberle or Eberle's clients, in these states, as shown by the Utah example, has the potential to block Eberle's clients from exercising their constitutional rights. Before the district court, ATA addressed this cumulative hazard of jurisdictions imposing such an avalanche of requirements on communicating through the mail. The states have confirmed the reality of this threat through their own previously filed *amicus curiae* briefs in this case. Over 26 state attorneys general or divisions have joined to file amicus briefs supporting Utah's Act in this litigation. Certainly, their appearances on behalf of their own state laws confirm that this is an issue that has national implications. Any nonprofit sending a letter can now expect to confront coast to coast restrictions and requirements similar to Utah's. Through the recent experiences of Eberle, the

following examples, all arising within the last three months, illustrate the difficulties faced by a party that has actually attempted to comply with the maze of requirements. Eberle has been or is registered with each of the states below.

A. PENNSYLVANIA

Pennsylvania is among the worst states in regard to confusing, burdensome and expensive registration requirements that threaten the constitutional rights of nonprofits. See 10 Pennsylvania Statutes Sec. 162.1 *et seq.* Additionally, Pennsylvania administrators issue cease and desist orders to any fund raising consultant or nonprofit which violate their interpretation of the state's registration requirements. In addition to the cease and desist orders, the entities are subject to criminal penalties and are fined. As an actual example of Pennsylvania's aggressive approach and its chilling effect on free speech, a volunteer-based nonprofit organization located in California had not registered in Pennsylvania and had been communicating with its supporters through the mail for a decade (it had no familiarity with the registration requirements of a foreign state such as Pennsylvania located across the country). Pennsylvania has now posted that nonprofit on their web site identifying them as a recipient of a state cease and desist order. This is done without listing that the violation arose only from a registration issue.[4] (Pennsylvania's long list of organizations that have not been able to meet its stringent registration requirements is at http://www.dos.state.pa.us/charity/c&d_orders.htm.) This listing, which takes place solely for a registration violation, is clearly stigmatizing and effectively encourages nonprofits who cannot afford to meet the state's requirements or cannot risk the

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[4] On May 10, 2000, Eberle learned that Pennsylvania has now also fined this nonprofit $12,000 for being not being registered and has demanded the fine be paid before it will license the nonprofit to mail into the state.

severe threats for noncompliance to avoid mailing to Pennsylvania residents.

Eberle has registered in Pennsylvania and has attempted to meet the state's requirements. Nevertheless, Eberle and its sister corporation, Fund Raising Strategies, Inc., have been fined thousands of dollars and/or had their registrations blocked at the whim of a state administrative assistant's interpretation and enforcement of the Pennsylvania statute.

1. Pennsylvania Has Fined Eberle for Attempting to Comply

Pennsylvania has fined Fund Raising Strategies $2,750.00 this year after it tried to register. The state has claimed that Fund Raising Strategies owes the $2,750.00 in fines because Fund Raising Strategies, which filed its first registration this year and did so voluntarily without any requests or prompting by Pennsylvania, was late in sending in its registration application and its contracts. Although, by filing, Fund Raising Stratgies had actually assisted to help the state in its purported goal of disclosure and having nonprofit information in its files, Pennsylvania continued to insist on collecting the fines and blocked Fund Raising Strategies from receiving its license unless fines, on top of the registration fees already submitted, were paid. This is how Pennsylvania repeatedly treats fund raising consultants and their clients when they do not comply with some minor requirement of the state. When they attempt to comply, they are fined for not perfectly satisfying some past state regulation or deadline.

2. Pennsylvania Attempts to Regulate Out-of-State Contracts

Pennsylvania currently imposes more restrictions on out-of-state parties than any other state. Relying on the same legal theories advanced by Utah, Pennsylvania even claims to have

the authority to dictate how out-of-state entities such as Eberle and its clients draft their contracts. Pennsylvania requires that it provide a certificate of approval for each Eberle contract with a client before any client can mail to residents in the state. This is clearly a prior restraint on First Amendment communications. If any of the state's requirements are not met, Pennsylvania will automatically block the client from mailing into the state. Rather than simply requesting a clarification to a contract or registration, Pennsylvania routinely blocks nonprofits from communicating with Pennsylvania citizens by denying approval of their contracts or applications for trivial reasons.

For example, Eberle was fined $1000 last year although both Eberle and its client had been properly registered with Pennsylvania for years and the state even had Eberle's contract with the client in its files. However, since the client and not Eberle had filed the contract, the state held Eberle in violation of its regulations because Eberle had not followed the normal procedure for the state's "approval" of the contract. Other than to increase the total amount of fines collected by the state there was no basis for the fine: all parties were registered and the state had the contract. However, Pennsylvania refused to waive the fine and held up the issuance of Eberle's license for months until it paid a fine.

Eberle has also had its contracts and registration applications rejected for the following reasons: 1) the state administrator decided that the signatures of a nonprofit's representatives on a contract were not sufficient because the names and titles were not also printed out (rather than clarifying this by telephone the entire contract was rejected); 2) Pennsylvania demands a fixed termination date in the indefinite future to be stated and refuses to accept Eberle contracts with their standard 90 day termination notice for either party to cancel the agreement (Pennsylvania's argument does not make sense: under its interpretation, December 31, 3099, would

somehow be an acceptable termination date for the agreement to protect nonprofits from an open ended contract, but Eberle's guaranteed right for the nonprofit to terminate anytime after 90 days notice is not acceptable); and 3) an administrator rejected an application stating that Bruce and Kathi Eberle, cofounders and directors of Eberle since 1974 who were even listed as residing at the same home address on the registration application, were not also listed as married on the registration form (this provision must have been a legislative error because there is no compelling or even legitimate reason why the Eberle's marital status is relevant).

For minor reasons such as these, Pennsylvania will reject the entire agreement or registration application and thus block Eberle's clients' ability to communicate with Pennsylvania residents. Eberle then must restart the process by resubmitting the contract (after sending it back to the client) or the application. As a result of this delay and wait for Pennsylvania to review the documents, the client or clients can not mail into Pennsylvania for additional weeks or months. The ability for Eberle's clients to mail in Pennsylvania has become subject to the judgment of an single administrator.

Eberle has raised the problem to Pennsylvania of registration costs for nonprofits who are sending their first mailing and cannot afford the registration costs for themselves or for their fund raising consultants. Pennsylvania regulators even acknowledged this problem of the cost and burden on small mailings but said it was a question for the legislature. Because Eberle and its clients are not from Pennsylvania, they have no representation in the Pennsylvania legislature.

Because of the fines, the cease and desist orders, and the administrative roadblocks, many clients and fund raising consultants now avoid sending any client mailings to Pennsylvania residents altogether. This result does not comport

with the intent of the First Amendment, the Commerce Clause or the Due Process Clause.

B. North Carolina

In February 2000, North Carolina refused to grant licenses to Bruce W. Eberle Associates, Inc. and to Fund Raising Strategies, Inc. although each had complied with all of the state's registration requirements. See N.C.G.S. Chapter 131F *et seq*. Despite the fact that North Carolina's statute has no requirement that a fund raising consultant's registration status be linked to that of its individual clients, North Carolina rejected the registrations because it claimed some of Eberle's or FRS's clients had not filed or renewed their own registration applications. Eberle repeatedly informed North Carolina that the state could contact the nonprofits directly if it was their position that the state's registration requirements would apply to them. Eberle had even provided the addresses of its clients in its own registration applications. Regardless, for two months North Carolina refused to issue Eberle or FRS a license because of its clients' registrations. This action jeopardized all of their clients' access to the 7.6 million residents of North Carolina.

North Carolina's position, like Utah's, is untenable: a single client of Eberle's that is a completely separate entity with no other association with Eberle other than the direct mail program can cause the revocation of or the delay of Eberle's license. By not registering or renewing its application, this client, without Eberle's knowledge, could jeopardize Eberle's active registration status. Accordingly, all nonprofits who use a fund raising consultant are now at the peril of other nonprofit clients' registration status who are working with that fund raising consultant. A single nonprofit who cannot comply with the maze of state registration requirements can imperil the

registration status of its fund raising consultant.[5] Because of the massive set of regulations that the states have enacted nationwide, it is inevitable that charities and nonprofits will not be able to comply with all the requirements. Therefore, using these violations as justification, state administrators now have the ability to silence and penalize nonprofits and their fund raising consultants at almost any time.

C. Florida; New York, New Jersey, Tennessee, California, Michigan and Minnesota

In the last three months, Eberle's clients have had their mailings jeopardized by registration requirements of Florida, New York, New Jersey, Tennessee, California, Michigan and Minnesota as set forth below:

1. Tennessee has informed Eberle that it must "cease all contractual obligations on behalf of a client" because the client is not registered in that state (Eberle is again in the situation where its registration position is put into jeopardy because of a client who may not even be aware of a foreign state's requirements). See T.C.A. § 48-101-501 *et seq.*;

2. Florida, which has recognized that Eberle did not have to register since it did not have any contacts with the state, rejected an Eberle client's registration because it listed Eberle as the fund raising consultant (it was later accepted). See Chapter 496 Florida Statutes;

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[5] On May 8, 2000, North Carolina notified an Eberle client that an unpaid $25.00 late charge had been imposed after the client filed its registration in June of 1999. The client, a nonprofit in Virginia, denies ever being notified about this additional fee but North Carolina is now demanding $300.00 for the nonpayment of the original $25.00 fee. The North Carolina administrator also stated that he has the authority to find the client and Eberle, as its fund raising consultant, in violation of the state's registration requirements starting from June 1999 because the client was not considered registered because of the unpaid $25.00 fee.

3. New York, which requires a yearly application fee of $800 (certainly not a small administrative fee), also claims extraterritorial jurisdiction over contracts and has recently taken the position that it has the authority to require that Eberle and its client change contract language that is not even applicable to Eberle's current services as a fund raising consultant (the contract is agreeable to both Eberle and the client and is only an issue for New York administrators because of the state's registration definitions - the same contract has been filed and accepted by New York and other states for years). See New York Executive Law, Article 7-A;

4. New Jersey has demanded that Eberle file a copy of a client's contract and pay an additional $30 for the filing although the state already has had the same contract filed for the past few years (state demands such as this again raise the question of whether the goal of registration is actually disclosure or merely an attempt by the state offices to raise funds). See N.J.S.A. 45:17A-18;

5. California has now demanded that Eberle stop serving its clients or register after the state changed its registration requirements to include fund raising consultants who do not solicit and do not have custody of any funds raised. See California Government Code Sec. 12599.1;

6. During preparation of this brief in May 2000, Michigan and Minnesota both ordered Eberle to take action regarding registrations (Michigan demanded a client's contract along with a "contract summary" required by the state, and Minnesota ordered that all mailings of two clients be barred because the clients had not registered.) See Michigan Statutes, 1975 PA 169; Minnesota Statutes Sec.309 .52;

D. Cumulative Effect

As depicted by the above examples, fund raising consultants and their clients are in danger of being "nit-picked" to death by the state administrators. Most fund raising

consultants and their nonprofit clients are small organizations (many rely primarily on volunteers) and cannot afford to keep up with the maze of regulations. In the case of Eberle, full time staff members, as well as its attorneys, devote tremendous and ever increasing amounts of time to complying with state registration requirements. Further, the above examples show how a few administrators in various states can jeopardize the ability of nonprofits to mail to 116.4 million state residents in a period of three months. The right of nonprofits to communicate across state lines should not be subject to the arbitrary decisions of state administrators.

III. MULTIPLE REGISTRATIONS ARE NOT THE LEAST RESTRICTIVE MEANS AND ARE PRIMARILY A BENEFIT TO STATE COFFERS.

Using their registration fees, states are now able to collect sizeable amounts of revenue from nonprofits and fund raising consultants who are the parties that, according to the states' arguments, the state is supposedly monitoring for their spending. For example, Pennsylvania's internet site claims to have 6400 charities registered with their Bureau of Charitable Solicitations. (This number is so high because of the Bureau's aggressive practice of threatening fines and penalties for not registering and their admitted practice of having sources collect bags of mail so the Bureau's Special Investigators can search for unregistered charities.) With Pennsylvania's application fees for nonexempt charities ranging from $100 to $250 apiece, Pennsylvania's yearly revenue from the nonprofits it is seeking to protect is at least $640,000. Add the registration fees for fund raising consultants and the enormous amount of fines it imposes (including the $12,000 fine referenced earlier) and it is clear that Pennsylvania has collected millions of dollars from nonprofits and their fund raising consultants. Of course, this does not, when considering the cost to nonprofits, include the administrative time and the legal costs borne by nonprofits, fund

raising consultants and others that, in most cases, dwarf the amounts actually paid to Pennsylvania. To determine the annual national costs of registration and their financial benefits to the states, the above figures have to be multiplied by every other jurisdiction in the country that imposes these registration requirements.

The costs of the redundant and burdensome registration requirements show that the process is not the least restrictive means of promoting the states' stated purpose of fraud prevention. Federal and state fraud statutes already cover the fraud issue that the states claim to be protecting. Any fraudulent action by a nonprofit or its fund raising consultant would be punishable under those statutes. Further, the Internal Revenue Service and other groups are making most of the information requested by the states available on the internet. The I.R.S is already providing its Form 990's available on guidestar.org. These are exactly the same 990's that are requested by the state registrations and disclose fund raising costs and other information. In fact, if the states had acted in the least restrictive means possible in an attempt to maintain their registration requirements, they could have required information from each of their own in-state fund raising consultants and charities and then pooled their information with that of other states in one location on the internet. Other than providing each state their separate revenue stream, this would have allowed the same information to be available without forcing the incredibly burdensome process of nationwide state by state and locality by locality registration.

IV. CONCLUSION

For the reasons set forth above, we respectfully urge this Court to grant the Writ of Certiorari.

Respectfully submitted,

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IN THE
Supreme Court of The United States

AMERICAN TARGET ADVERTISING, INC.
Petitioner,

v.

FRANCINE A. GIANI, DIVISION DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent.

On Petition for a Writ of Certiorari
To the U.S. Court of Appeals for the Tenth Circuit

BRIEF OF FREE SPEECH DEFENSE AND EDUCATION FUND, INC., ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

This *amicus curiae* brief is submitted on behalf of the Free Speech Defense and Education Fund, Inc. ("FSDEF"), a non-profit educational organization dedicated to defending First Amendment rights, as well as other nonprofit organizations and commercial firms seeking to protect their constitutional rights.[1] FSDEF, incorporated in Maryland in 1995, is a nonpartisan educational organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3).

Joining as *co-amicus* is the Free Speech Coalition, Inc. ("FSC"), a nonpartisan IRC section 501(c)(4) organization dedicated to the protection of human and civil rights secured by law, such as the right of free speech at issue in this litigation. Its members include nonprofit organizations engaged in educational activities throughout the country and for-profit firms that serve such nonprofits.

Joining as *co-amici* are the following IRC section 501(c)(3) charitable/educational organizations that use direct mail nationwide in their educational and fundraising efforts: American Center for Law & Justice (DC), Inc.; American Civil Rights Union; American Conservative Union; American Health Assistance Foundation; American Studies Center; America's Future; America's Prayer Network; The Arthritis Trust of America; Center for the Defense of Free Enterprise; Christian Legal Defense Fund; Citizens United Foundation; Claremont Institute; Concerned Women for America; The Freedom Alliance; High Frontier; Jerry Falwell Ministries; The Leadership Institute; Lincoln Institute for Research and Education, Inc.; Media Research Center; Second Amendment

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Foundation; U.S. Taxpayers Institute; World Emergency Relief; and Young America's Foundation.

The following IRC section 501(c)(4) organizations, that use direct mail nationally in their educational and fundraising efforts, also join as *co-amici*: The Abraham Lincoln Foundation for Public Policy Research, Inc.; American Policy Center; Americans Back in Charge Foundation; Americans for Tax Reform; Citizens Committee for the Right to Keep & Bear Arms; Citizens United; The Liberty Alliance; National Tax Limitation Committee; The Senior's Coalition; 60 Plus Association; Traditional Values Coalition; and United Seniors Association.

Finally, the following for-profit organizations join as *co-amici*. They, like petitioner, assist nonprofit organizations with their educational and fundraising programs: Concepts Direct, Inc.; Creative Response Concepts; the Delta Group USA, Inc.; Exempt Organization Tax Consulting; Lewis & Company Marketing Communications, Inc.; Morgan Meredith & Associates; Newport Creative Communications; Response Development Corporation; Richard Norman Company; Squire & Heartfield Direct, Inc.; Stephen Clouse & Associates, Inc.; and Stephen Winchell & Associates, Inc.

FSDEF and its *co-amici* have a strong interest in the matters raised in this litigation, as they may be both directly and indirectly affected by Utah's regulations. Moreover, Utah's licensing and registration requirements at issue in this case are just part of a national array of state and local laws and regulations which burden the dissemination of ideas nationwide.[2]

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[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk.

SUMMARY OF ARGUMENT

Certiorari should be granted to resettle the law that was misapplied by the court of appeals. Had the court of appeals adhered to applicable First Amendment principles governing prior restraints, it would have struck down the entire Utah Act. Had the court adhered to authoritative First Amendment principles governing regulations of core political speech, it would have found the Utah Act an unconstitutionally discriminatory regulation of the freedom of speech. Finally, had the court of appeals adhered to applicable Commerce and Due Process principles governing the territorial limits of state jurisdiction, as authoritatively applied by this Court, it would have found the application of the Utah Act to petitioner unconstitutional.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESETTLE THE LAW GOVERNING IMPORTANT CONSTITUTIONAL PROTECTIONS

In its decision below, the United States Court of Appeals for the Tenth Circuit erroneously applied the principles of this Court in two critical areas of First Amendment jurisprudence, and wrongly rejected the petitioner's Commerce Clause and Due Process challenges to a Utah statute that purports to regulate the business conduct and First Amendment activity of persons and organizations with no Utah contacts. The potential ramifications of this decision, particularly in this era of information explosion and communication on the Internet, cannot be overstated. If the decision below is allowed to stand, similar unconstitutional state legislation will proliferate, imposing ever greater burdens on core First Amendment activities.

At issue is Utah's Charitable Solicitations Act (the "Utah Act"), embodying state law provisions similar to the type found unconstitutional by this Court in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), Sect'y. of State v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Riley v. National Fed. of the Blind of N.C., 487 U.S. 781 (1988). The court of appeals struck down a portion of the statute, but left most of the provisions intact, incorrectly sustaining prior restraints on core First Amendment speech.

The Utah Act not only imposes licensing and disclosure requirements on nonresident, nonprofit organizations' messages sent to residences in the state, if the messages contain requests for charitable contributions — the lifeblood of many nonprofit organizations — it also regulates the nonprofits' nonresident consultants. The Utah Act requires such professional fundraising consultants to obtain a **license** before entering into a contract to enhance "core First Amendment Speech," even though that contract was entered into **wholly outside** Utah. Moreover, as part of the licensing process, the firm must make **detailed disclosures** of that consultant's methods, expenses, and fees in connection with the planned solicitation in the state, net profits of the previous calendar year earned from any of its consultative activities, the names and residence addresses of officers and directors, and its personnel's previous three-year employment histories.

The court of appeals below found these burdensome and intrusive licensing and disclosure requirements permissible, notwithstanding its finding that such requirements constituted a "prior restraint." 199 F.3d 1241 (10th Cir. 2000), Pet. Cert. App. at 9a-10a. Instead of subjecting the Utah Act to the constitutionally-required examination applicable to prior restraints, however, the court of appeals nibbled around the statute's unconstitutional edges, failing to apply strict scrutiny

to the state's claimed interest in protecting the people from fraud to justify overriding core First Amendment rights of American Target Advertising, Inc. ("ATA") and its nonprofit organizational client, Judicial Watch.

II. THE DECISION OF THE COURT OF APPEALS THAT THE UTAH ACT OPERATES AS A PERMISSIBLE PRIOR RESTRAINT CONFLICTS WITH THE FREEDOM OF THE PRESS AS AUTHORITATIVELY APPLIED BY THIS COURT.

A. The Court Below Applied Inapplicable Precedents.

Relying on Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975), and FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990), the court of appeals maintained that there were only "'two evils' that will not be tolerated" in any system of prior restraint: (1) "[N]o system of prior restraint may place 'unbridled discretion in the hands of a government official or agency,'" and (2) "'a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible.'" Pet. Cert. App. at 10a. Neither the cases cited, nor the two-part test enunciated, apply to this case where core First Amendment speech is mailed directly to homeowners.

In Southeastern Promotions, the speech at issue concerned a musical production which included group nudity and simulated sex. In FW/PBS, the speech in question emanated from sexually oriented businesses, including "adult" arcades, bookstores, video stores, cabarets, motels, theaters, as well as escort agencies, nude model studios and sexual encounter centers. In Southeastern Promotions, the question presented was the constitutionality of the standards employed by a government agency with authority to determine access to a government-

owned and operated municipal auditorium. In FW/PBS, the question presented was the constitutionality of a city ordinance licensing sexually oriented businesses.

Both cases dealt with "low" value speech, bordering on constitutionally unprotected obscenity, and therefore not subject to the higher standards governing prior restraints placed on core First Amendment speech. *Contrast* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54-55 (1973) (state law authorizing injunction against publication of obscenity consistent with First Amendment so long as no restraint is imposed "until after a full adversary proceeding and a final judicial determination [that] the materials were constitutionally unprotected") *with* Near v. Minnesota, 283 U.S. 697 (1931) (state law authorizing injunction against "malicious, scandalous and defamatory" publication held unconstitutional even though no restraint imposed until after full adversary hearing and judicial determination that publication was constitutionally unprotected).

Because the normal rules governing prior restraints do not apply to sexually-explicit expression, this Court has developed distinct sets of substantive and procedural rules to govern such expressions. Substantively, the rules governing sexually-explicit material must conform to the constitutionally-prescribed definition of obscenity as determined by this Court. *See* Paris Adult Theatre I, 413 U.S. at 69-70. Procedurally, the exercise of the power of prior restraint with respect to such material must conform to the time safeguards of Freedman v. Maryland, 380 U.S. 51, 58-60 (1965).

Neither of these rules applies to the prior restraint of core First Amendment speech at issue in this case. As Justice Brennan observed in his concurring opinion in New York Times v. United States, 403 U.S. 713, 726, n. * (1971), the Pentagon Papers case:

> Freedman v. Maryland ... and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedoms of speech and press." ... Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment.... [Citations omitted.]

The court of appeals below found that "charitable solicitations," like the publication of the Pentagon Papers, "qualify as protected speech for First Amendment purposes." Pet. Cert. App. at 3a. Yet it applied Freedman v. Maryland to support its ruling that the "ten-day" self-imposed administrative deadline for processing initial applications and renewals of registration is constitutionally sufficient to protect charitable organizations and their fundraising partners from any impermissible prior restraint. Pet. Cert. App. At 15a-17a. As this Court ruled in the Pentagon Papers case, however, where the government seeks prior restraint of core First Amendment speech, the question is whether it has overcome the "heavy presumption against [the restraint's] constitutional validity." 403 U.S. at 714.

B. Nothing in this Record Justifies the Imposition of a Prior Restraint.

The court of appeals found that the "Utah Act targets the secondary effects of professional solicitations, *i.e.*, increased fraud and misrepresentation." Pet. Cert. App. at 4a. Just because a prior restraint targets a "secondary effect" of core First Amendment speech does not mean that it meets the high constitutional standard required of prior restraints. In the Pentagon Papers case, Justice Brennan stated in his concurring opinion that "the First Amendment tolerates **absolutely no** prior restraints of the press predicated upon surmise or

conjecture that untoward consequences may result." New York Times, 403 U.S. at 725-26 (emphasis added).

Moreover, protecting the public from "increased fraud and misrepresentation" does not rise to the level of the extraordinary interest that the government must show to justify a prior restraint. According to this Court's precedents, "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden ...." *Id.* at 726 (Brennan, J., concurring) (citation omitted). As Chief Justice Charles Evans Hughes wrote, any exception to "the deep-seated conviction" against prior restraints requires clear and convincing proof of an imminent danger of the highest order. Near v. Minnesota, 283 U.S. at 715-16, 718 (1931).

These rulings apply with special force in this case. ATA and its founder, Richard A. Viguerie, are pioneers in political direct mail. "When it comes to conservative fundraising one name stands out above all the rest: Richard A. Viguerie. Often referred to as the 'Godfather of the New Right,' ... his constituent response mailing[s] have inundated Congress with millions of postcards, letters, and petitions." James C. Roberts, *The Conservative Decade*, at 59 (1980). As the district court found in this case, ATA has continued its role in direct mail as the fundraising consultant employed by Judicial Watch, a "'political watchdog' organization," to "plan, manage and prepare materials relating to Judicial Watch's nationwide information distribution and fundraising program." (23 F.Supp.2d 1303 (D. Utah 1998), Pet. Cert. App. at 23a).

Although the court below found that "[m]andatory registration and disclosure enable Utah citizens to make informed decisions concerning their charitable donations," this record does not indicate that the information furnished to Utah ever reaches any Utah citizen. Nor does the statute require the

Director of the Division of Consumer Protection to publish the information contained in the filings that he receives. Thus, Utah has not met its "very heavy burden" to justify any prior restraint. *See* New York Times, 403 U.S. at 730 (White, J. concurring).

According to the controlling precedents of this Court, Utah cannot justify its prior restraint upon ATA and Judicial Watch any more that the United States could justify its attempted prior restraint upon *The New York Times* and *The Washington Post*. In this case, the state claims that its effort is to stop the secondary effects of increased fraud and misrepresentation; in the Pentagon Papers case, the government's effort was undertaken to stop the "secondary effects" of danger to the "national security." As this Court stated, the only remedy permitted by the First Amendment is a subsequent prosecution for violation of a valid law.

C. The Utah Act Confers Unconstitutional Editorial Power Upon the Government.

Not only does the First Amendment require a high threshold justification to uphold prior restraints, it denies to the government the exercise of editorial control that the freedom of the press secures to the people. This principle has been recognized since the days of Sir William Blackstone, who wrote in his *Commentaries* that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press...." 4 W. Blackstone, *Commentaries on the Laws of England* 151-52 (U. of Chi. Press, Facs. ed. 1979). Thus, this Court denied to the State of Florida power to force the state's print media to be "fair" to candidates in an election campaign, because this power would intrude upon the "function of editors" which

absolutely belongs to the media owners. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

This power of editorial control is not confined, however, to the speaker or publisher, but extends also to the hearer or recipient. Hence, this Court held in Martin v. City of Struthers, 319 U.S. 141 (1943), that it was unconstitutional for the city to interpose itself between a door-to-door hand biller and the homeowner. As Justice Hugo Black wrote for the Court:

> While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas....
>
> Freedom to distribute information to every citizen whenever **he desires to receive it** is so clearly vital to the preservation of a free society that, putting aside... regulations of time and manner of distribution, it **must be fully preserved**....
>
> The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated he is unwilling to be disturbed. This ... **leaves the decision as to whether distributors may lawfully call at a home where it belongs — with the homeowner himself.** [*Id.* at 145, 147, 148 (emphasis added).]

In 1970, this Court reaffirmed the unalienable right of the householder to control what comes into his home. Chief Justice Warren Burger wrote:

> In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit

> every householder to exercise control over unwanted mail. [Rowan v. Post Office Dept., 397 U.S. 728, 736 (1970).]

Under the Utah Act, however, it is the Director of the Division of Consumer Protection — not the householder — who decides whether the householder will receive certain mail. It is the Director whom a charitable solicitor and its fundraiser must satisfy that they have not, for example, "materially misrepresented ... the purpose and manner in which contributed funds and property will be used in connection with any solicitation." Utah Code Ann. Sec. 13-22-12(1)(b)(v), Pet. Cert. App. at 57a-58a. This exercise of censorial power is unconstitutional. As Justice Brennan stated in Riley, 487 U.S. at 791:

> "The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind." To this end, the government, even with the purest of motives, may **not substitute its judgment as to how best to speak for that of speakers and listeners**; free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities. [Citation omitted, emphasis added.]

Contrary to the erroneous assumption of the court of appeals below, this case does not concern the constitutionality of the discretion of a government official in relation to the use of government-owned property. *See* Pet. Cert. App. 10a. Rather, it concerns the discretion that a government official has over the private mail box of a householder. According to this Court's ruling in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the **only** discretion that a government official has with respect to a piece of mail, if it is otherwise legal, is to honor the discretion of the householder: "[w]e have never held

that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* at 72. The householder, not the government, must decide whether mail is misleading, and therefore, worthy of the trash can, or the kitchen table for family discussion and consideration. As Justice Scalia stated in his concurring opinion in Riley, "it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them." 487 U.S. at 804.

III. THE DECISION OF THE COURT OF APPEALS TO APPLY "AN INTERMEDIATE LEVEL OF SCRUTINY" TO THE UTAH ACT CONFLICTS WITH APPLICABLE PRECEDENTS OF THIS COURT.

A. The Court Below Applied Inapplicable Supreme Court Precedents.

The court below subjected the Utah Act to "'an intermediate level of scrutiny'" on the grounds that it is a "[c]ontent neutral regulation of protected speech." The court reached the conclusion that the Utah Act was "content neutral" solely on the basis that the Act was "designed not to 'suppress the expression of unpopular views' but rather to control the 'secondary' effects of speech." In support of this proposition, the court relied upon only one case, Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Here again, the court of appeals has relied upon a precedent that demonstrably does not apply to this case.

Renton dealt with a city zoning ordinance that applied only to "adult motion picture theatres." Accordingly, this Court followed a special rule governing "zoning ordinances designed

to combat the undesirable secondary effects" of "businesses that purvey sexually explicit materials," *id.* at 49, supporting that special rule on the grounds that "'society's interest in protecting this type of expression is of a **wholly different, and lesser, magnitude** then the interest in untrammeled political debate....'" *Id.* n.2., *quoting* Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (plurality opinion).

As Justice Scalia recently observed, "our society, like other free but civilized societies, has permitted restrictions upon the **content** of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (emphasis added). And as Justice Scalia has further explained, the categories of "low" value speech have increasingly **narrowed**, not broadened, as the court of appeals below erroneously assumed when it extended to core First Amendment speech special rules designed only for fringe First Amendment speech. *See id.* at 383-84.

Had the court below correctly applied this Court's precedents, it would have found that the First Amendment standard of "content neutrality" was not met, as it was in Renton, solely because the Utah Act was not designed to "suppress the expression of unpopular views." Rather, as this Court ruled in Riley, **a charitable solicitation case,** the standard of "content neutrality," applicable to a core First Amendment speech case, also requires that a law not discriminate on the basis of subject matter. Thus, this Court has specifically ruled that core political speech cannot be parsed, as if it were a commercial advertisement, to separate out that which is subject to the state's interest in preventing fraud. Riley, 487 U.S. at 795-96. Yet, that is exactly what the court of appeals did, focusing only upon the "secondary effects" of charitable solicitations. Had it

correctly subjected the Utah Act "to exacting First Amendment scrutiny," as required by Riley, 487 U.S. at 798, it would have found that the Utah Act is **not** content neutral.

B. The Utah Act is Not Content Neutral.

Just because a law targets fraud or misrepresentation does not make it content neutral. After all, the North Carolina Charitable Solicitations Act in Riley targeted "fraud," but this Court found the requirement that professional fundraisers make certain disclosures to potential donors to be "a content-based regulation of speech." 487 U.S. at 795. Here also the Utah Act is content-based, even though it is designed to prevent fraud.

The Act does not apply to all charitable solicitations in the state. Section 13-22-8 contains 10 exemptions, including charitable solicitations conducted by a "bona fide religious, ecclesiastical or denominational organization," solicitations by "broadcast media owned and operated by an educational institution or governmental entity, or any entity organized solely for the support of that broadcast media," "any school accredited by the state, any accredited institution of higher learning, or club or parent, teacher, or student organization within and authorized by the school in support of the operations or extracurricular activities of the school," and "a public or higher education foundation established under Title 53A or 53B."

In City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994), this Court warned that a city sign ordinance, allegedly designed to achieve environmental and safety objects, but which contained (coincidentally) 10 "[e]xemptions from an otherwise legitimate regulation of a medium of speech," may "diminish the credibility of the government's rationale for restricting speech in the first place." Such "under-inclusiveness" triggers strict scrutiny to determine if the exemptions relate solely to the non-speech

reasons for the statute. This Court found a city ordinance unconstitutional because it excepted "peaceful picketing of any school involved in a labor dispute" from its ban on picketing near schools. Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 100-101 (1972). As this Court reiterated in City of Cincinnati v. Discovery Network, 507 U.S. 410, 416 (1993), it "was the city's burden to establish a 'reasonable fit' between its legitimate interests of safety and esthetics and its choice of a limited and selective prohibition ... as the means chosen to serve those interests."

It was not enough, then, for the circuit court to accept the Utah claim that the law was aimed only at the "secondary effects of increased fraud and misrepresentation." *See* Pet. Cert. App. at 4a, n. 1. To the contrary, the Utah Act should have been strictly scrutinized to determine if the 10 categories of charitable solicitations exempted from the Act did not raise the same risk of "increased fraud and misrepresentation" as the charitable solicitations subject to the law.

This error was compounded by the circuit court's refusal even to acknowledge that the Act singles out charitable solicitations by direct mail for special regulation, leaving commercial solicitations by direct mail unregulated. Such a preference for commercial over noncommercial speech has been found by this Court to be unconstitutional. Metromedia, Inc. v. San Diego, 453 U.S. 490, 521 (1981) (plurality opinion).

C. The Utah Act Serves No Compelling Interest and Employs Impermissible Means to Prevent Fraud and Misrepresentation.

In Simon & Schuster, Inc. v. N.Y. Crime Victims Board, 502 U.S. 105, 115 (1991), Justice O'Connor wrote that a "statute is presumptively inconsistent with the First Amend-

ment if it imposes a financial burden on speakers because of the content of their speech." This principle, she noted, not only applies to a tax, but also to any regulation which imposes a financial burden upon some speakers, but not others, on the basis of the content of their speech: "In the context of financial regulation, it bears repeating," Justice O'Connor explained, "that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.*, at 116.

The court of appeals completely disregarded this well-established principle, ruling that the financial burdens, except for the bonding or letter of credit requirement, served only "the state's substantial interest in fighting fraud" and "defray[ed] reasonable administrative costs." Pet. Cert. App. at 6a-7a. According to Simon & Schuster, however, the correct inquiry is whether the Utah Act "imposes a financial disincentive only on speech of a particular content." 502 U.S. at 116. That inquiry can only be answered by examination of the statutory language laying out the qualifications set for claiming exemption from the Act.

According to Utah Code Section 13-22-5(b) "a bona fide religious, ecclesiastical or denominational organization" may claim an exemption if the charitable solicitation "is made for a church, missionary, religious or humanitarian purpose." According to Section 13-22-5(c), an "entity organized solely for the support of [certain] broadcast media" may claim exemption for charitable solicitations related to the support of such broadcast media. Section 13-22-5(g) exempts certain accredited schools and universities for charitable solicitations "in support of the operations or extracurricular activities of the school." These three examples alone demonstrate that ATA and Judicial Watch, and other organizations and solicitations

that do not qualify for any exemption, face a "financial disincentive" that the exempted organizations do not face.

Applying strict scrutiny, the Utah Act may be sustained only if it "'serves a compelling state interest and is narrowly drawn to achieve that end.'" *Id.* at 118. Although Utah may have an interest in protecting its residents from fraud and misrepresentation, the state legislature's exemption of 10 categories of charitable solicitations from regulation by this Act alone casts significant doubt upon the "strength" of the interest in preventing fraud and misrepresentation. If the state's interest were compelling, there would have been full coverage without exception. *See* City of Ladue, 512 U.S. at 53.

Not only is the claim that the Utah Act serves a compelling state interest weakened by the statutory exemptions, but those exemptions also weaken the claim that the statute is narrowly drawn to achieve the state's goal. The question here is whether Utah may single out some fundraising counsel and impose upon those persons — but not others — duties to register and disclose certain information as a preventive measure to combat "increased fraud and misrepresentation." According to this Court's precedents, the answer is no. Such a law is "impermissibly **underinclusive**" (*id.* at 51, emphasis added), because such increased risk "'can be controlled by narrowly drawn statutes' ... focusing on the abuses and dealing **even-handedly**" with charitable solicitations "regardless of subject matter." Police Dept. of Chicago v. Mosley, 408 U.S. at 102.

IV. THE COURT OF APPEALS DISREGARDED THIS COURT'S APPLICABLE PRECEDENTS AND ERRONEOUSLY DENIED THE PETITIONER'S COMMERCE AND DUE PROCESS CLAIMS.

A. The Court of Appeals Ignored This Court's Minimum Standard Prohibiting Extraterritorial State Regulations under the Commerce Clause.

Utah asserted, and the court of appeals found, that the Utah Act did not regulate ATA's conduct outside of Utah's borders. Supporting its finding, the court of appeals attempted to distinguish this case from Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986). The court of appeals missed the point of Brown-Forman, because it failed to acknowledge that the practical effect of the Utah Act is to regulate activities wholly outside the state, which, in turn, exposes nonresidents to the likelihood of "inconsistent obligations in different states." Brown-Forman, 476 U.S. at 583.

Furthermore, Utah's claim that it has jurisdiction over an out-of-state business that does not even conduct business in the state is so far-reaching that, if accepted, it would seriously undermine the constitution's commitment to the free flow of interstate commerce. In Edgar v. MITE Corp., 457 U.S. 624, 641 (1982), this Court addressed the constitutionality of an Illinois statute that "directly regulate[d] transactions ... wholly outside the State of Illinois." Recognizing its "sweeping extraterritorial effect," this Court found the Illinois law invalid solely because it "purport[ed] to regulate directly and to interdict interstate commerce, including commerce wholly outside the State." *Id.*, 457 U.S. at 642-43. This *per se* rule of unconstitutionality was reaffirmed in Healy v. The Beer Institute, 491 U.S. 324, 336 (1989), where Justice Blackmun wrote that

"[t]aken together, our cases concerning the extraterritorial effects of state economic regulation stand **at a minimum** for the ... proposition [that] the 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" (Emphasis added.)

B. The Court Below Also Misapplied this Court's Jurisdictional Tests for State Regulations Under the Commerce and Due Process Clauses.

The only territorial connection that ATA had with the State of Utah is that its client, Judicial Watch, chose to solicit, by direct mail, contributions from Utah residents. According to National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753, 758-60 (1967), use of the mails to solicit business and deliver goods is not a sufficient nexus under the Commerce Clause to justify requiring the mailer to collect a use tax. That bright-line rule was expressly affirmed in Quill Corp. v. North Dakota, 504 U.S. 298, 314-15 (1992).

According to the court of appeals, however, that bright-line rule applies only to tax burdens, not "licensing and registration requirements." Pet. Cert. App. at 18a-19a. The court is seriously mistaken. As this Court stated in Quill, the Commerce Clause's requirement that there be a "substantial nexus" between the taxing state and the person burdened with collecting the tax reflects "structural concerns about the effects of state **regulation** on the national economy." 504 U.S. at 312 (emphasis added). Indeed, the burdens imposed in National Bellas Hess and Quill were not a "tax" *per se*, but a regulation requiring the collection of a tax owed not by the out-of-state seller, but by the in-state buyer. The court of appeals erred, therefore, in limiting the reach of the "substantial nexus" test to a "formalistic" distinction between a "tax burden" and a

"licensing and registration requirement." *See* Quill, 504 U.S. at 314-15.

Not only did the court of appeals seriously mistake the jurisdictional rule under the Commerce Clause, but it erroneously assumed that the Due Process rule that governs the exercise of state judicial power is identical to the one governing the exercise of legislative power. *See* Pet. Cert. App. at 19a-20a. Chiding ATA for claiming that the Due Process rules are different "[w]ithout apparent authority," the Court of Appeals ignored Justice Scalia's concurring opinion, joined in by Justices Kennedy and Thomas, in Quill that stated their "understand[ing] ... that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are [not] necessarily identical...." 504 U.S. at 319-20. Indeed, this Court's ruling in American Oil Co. v. Neill, 380 U.S. 451 (1965), demands more contacts with a taxing state than mere "purposeful availment" in order to justify the imposition of a tax on revenues generated by activi-ties taking place wholly outside the taxing state. Likewise, here, the imposition of burdensome regulatory requirements upon ATA's activities taking place wholly outside of the State of Utah demands more contact with Utah than knowing that some of the direct mail of a national solicitation campaign was "purposefully directed" to Utah residents.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 99-1647

IN THE
Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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Two features of the Brief in Opposition are especially noteworthy. First, respondent does not take issue with our demonstration that the question presented in the petition is a recurrent issue of great national importance. Indeed, respondent's conditional cross petition explicitly asserts that the issues raised by this case are important enough to warrant this Court's review. See 99-1829 Pet. 8. Second, in the Brief in Opposition, as in the courts below, respondent has failed to identify a single reason why Utah is justified in going beyond the reasonable regulation of organizations that solicit contributions in the state to impose registration and disclosure requirements on organizations like ATA, which do not engage in solicitation—or, for that matter any other activity—in Utah.

Instead of explaining why Utah has an interest in regulating fundraising consultants like ATA, respondent tries to change the subject by suggesting that ATA is more than a fundraising

consultant. Respondent also attempts to defend the court of appeals' plainly wrong decision to use intermediate scrutiny in reviewing the regulations at issue in this case. And respondent asserts, erroneously, that ATA failed to raise below issues that it did in fact raise.

1. Respondent, apparently aware that she cannot provide any justification for regulating fundraising consultants like ATA, repeatedly tries to suggest that ATA is not just a consultant but is itself somehow involved in seeking charitable contributions on behalf of Judicial Watch. See, *e.g.*, Br. in Op. 4-6, 9-10, 22. This is simply a diversionary tactic. The Utah Act itself places "fund raising counsel or consultant[s]" in a wholly separate category from, for example, "[p]rofessional fund raiser[s]" and "[p]aid solicitor[s]" (see Utah Stat. Ann. §§ 13-22-2 (9), (10), (11)), who provide services that may include door-to-door collection of contributions. Respondent has never suggested that ATA is required to register as anything other than a "fund raising counsel or consultant," and this suit challenges the registration and disclosure requirements imposed on fundraising counsel and consultants.[1] Respondent's effort to portray ATA as a fundraiser in Utah is an attempt to blur the categories that Utah's own statute establishes, and it reveals respondent's awareness of what we have always maintained: that the regulation of the "fundraising counsel" category, at least, simply cannot be justified.

2. Rather than providing an explanation of why Utah is justified in imposing burdensome registration and disclosure requirements on organizations like ATA, respondent makes vague and sweeping statements about the need to prevent fraud. See, *e.g.*, Br. in Op. 14, 20, 26-27. The record is, in

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[1] Needless to say, the principles for which we contend will have broader application, but in this litigation ATA has not challenged the other provisions of the Utah Act.

fact, completely devoid of any facts supporting a requirement that out-of-state consultants like ATA obtain a license before providing out-of-state services to nonprofit organizations.[2] Faced with the utter absence of record evidence, respondent, like the courts below, relies on dicta from this Court's opinions that refer to the regulation of door-to-door solicitation. See, *e.g*, Br. in Op. 16, citing *Riley v. National Federation of the Blind*, 487 U.S. 781, 792 (1988). But the regulation of door-to-door solicitation is completely different from the regulation of organizations like ATA, who are not engaged in any form of solicitation. Respondent's ritual invocation of the general interest in preventing "fraud" is not enough to defend this specific regulatory regime, which requires both a license and extensive disclosures and—most significantly—is directed at organizations like ATA that themselves have no contact with Utah citizens.[3]

At no point in this litigation has respondent provided any explanation of why the need to prevent fraud against Utah citizens justifies it in requiring non-soliciting consultants like ATA to obtain a license and to disclose such highly invasive matters as their officers' home addresses and their plans and strategies for fundraising. See Utah Stat. Ann. §§ 13-22-9(1)(b)(v), 13-22-9(1)(b)(vii)(A)(B). At no point has respon-

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[2] Respondent must make an even greater showing than this. Regulatory requirements like Utah's would effectively prevent nonprofit organizations who have received some advice from a professional consultant from sending out any mail unless every consultant who has advised them is registered in every state to which they wish to send mail. There are, of course, no facts in the record that remotely support the imposition of such a burden on nonprofit organizations.

[3] Notably, respondent failed to offer any statistical or other evidence of the fraud she claims is the reason for Utah's licensing scheme (C.A. App. 541), despite being asked specifically for such support by the district court (*id.* at 525).

"C.A. App." refers to the appendix filed in the court of appeals. In the petition we mistakenly referred to this document as "Dist. Ct. App."

dent explained why Utah's interests cannot be fully accommodated by reasonable regulation of the organizations that themselves solicit contributions (or by other less restrictive means, some of which ATA itself suggested in the courts below. See C.A. App. 126, 508.). And as we showed in the petition, the fact that there is no justification for the Utah Act makes it unconstitutional not just under the First Amendment—which requires not just a justification but a compelling justification—but under the Commerce Clause and the Due Process Clause as well. See Pet. 15-16, 17-19, 20.

3. Respondent also defends the court of appeals' erroneous ruling that regulations like those imposed on ATA are subject only to intermediate scrutiny. See Br. in Op. 12-20. Respondent's approach, like the court of appeals' decision, would severely damage the principle this Court has carefully established—that strict scrutiny applies to laws, like the Utah Act, that are neither content neutral nor merely limits on the time, place, and manner of speech.

Respondent first denies that the Act is a content-based regulation—even though the Act, by its terms, refers to the content of both ATA's speech and its clients' speech. The Act seeks to regulate ATA because ATA "plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization" (Utah Stat. Ann. § 13-22-2 (11)(a)(1)). If ATA were to "advise[]" or "counsel[] * * * with respect to" any other subject, it would not be covered by the Act. Respondent argues (Br. in Op. 13-14) that the Act is not content-based because it does not discriminate against particular points of view, but this argument misunderstands the law: the Court has repeatedly held that strict scrutiny applies to content-based regulations of speech even if they are neutral among viewpoints. See, *e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345, 347 (1995) ("[E]ven though this provision applies evenhandedly to advocates of

differing viewpoints, it is a direct regulation of the content of speech"); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

Respondent, revealingly, relies (Br. in Op. 14, 15) on two cases—*Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Turner Broadcasting Systems v. FCC*, 512 U.S. 622 (1994)—both of which deal with content-neutral measures that, as the Court explicitly noted, regulate only the time, place, or manner of speech. See *Ward*, 491 U.S. at 789; *Turner Broadcasting*, 512 U.S. at 637. The Utah Act is precisely *not* a time, place, or manner regulation. It forbids any direct mailings containing solicitations by clients who receive advice from consultants who have not registered. Respondent fails to identify any case in which this Court has applied anything less than strict scrutiny to a measure like the Utah Act.

Similarly, the notion that the Act regulates only "secondary effects" (see Br. in Op. 14) is wrong. Respondent's repeated assertion is that the Act is needed to prevent Utah citizens from being defrauded. See, *e.g.*, Br. in Op. 14, 17-20. But concerns about fraud "'focus[] only on the content of speech and the direct impact that speech has on its listeners.' " *United States v. Playboy Entertainment Group*, 120 S. Ct. 1878, —— (2000) (2000 WL 646196, *6), quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.). "This is the essence of content-based regulation." *Playboy Entertainment Group*, 120 S. Ct. at —— (2000 WL 646196, *6).

The real basis of respondent's position is revealed by her statement that "regulation is not triggered by the mere exercise of First Amendment freedoms, but by the solicitation of contributions from Utah residents." Br. in Op. 21. As this Court has repeatedly held, the solicitation of contributions *is* an exercise of First Amendment freedom. See, *e.g.*, *Riley*, 487 U.S. at 787-88; *Secretary of State v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 959-60 (1984); *Village of Schaum-*

burg v. Citizens for a Better Environment, 444 U.S. 620, 632-33 (1980). Respondent ignores what this Court has specifically described as "the reality that without solicitation the flow of * * * information and advocacy [by nonprofit organizations] would likely cease." *Riley*, 487 U.S. at 796 (internal quotation marks and citation omitted).

Indeed, as we argued in the petition (Pet. 8)—and respondent ignores—the speech restricted by the Utah Act involves multiple First Amendment rights. The letters that are restrained by the Utah Act often contain petitions to the government. See, *e.g.*, C.A. App. 227, 229-54. Direct mail is often the only practical means by which out-of-state nonprofit organizations may circulate petitions to citizens of Utah; indeed it is the only means by which small organizations may circulate petitions nationally. In addition, as this Court has recognized, "[t]he First Amendment freedom of association is squarely implicated" by a measure that, like the Utah Act, restricts the ability of organizations to aggregate the contributions of large numbers of individuals. See *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 494 (1985).

4. Unable to answer the arguments we advance in the petition, respondent repeatedly asserts that we failed to make those arguments below. In every respect, respondent is mistaken. Respondent asserts (Br. in Op. 12 n.5) that in the courts below we asserted only the First Amendment rights of ATA's clients and did not argue that ATA's own First Amendment rights were at issue; but in our briefs in the courts below, we argued that the Act violated both ATA's and its clients' First Amendment rights. See, *e.g.*, ATA C.A. Br. 10 (describing the Utah Act as a "double prior restraint" because it restricts the rights of both ATA and its clients); *id.* at 31.

Similarly, respondent asserts (Br. in Op. 18) that we have not previously challenged the Act's distinction between paid and unpaid consultants, a distinction that, as we showed in the

petition, is flatly inconsistent with *Meyer v. Grant*, 486 U.S. 414 (1986). But we made that precise argument, specifically citing *Meyer v. Grant*, in our brief in the court of appeals. ATA C.A. Br. 24.[4] Respondent's further argument that *Meyer v. Grant* does not control here because the Utah Act only restricts ATA's speech, rather than banning it outright, is concisely answered by this Court's recent opinion in *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. at —— (2000 WL 646196, *6):

> It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.

Finally, respondent asserts (Br. in Op. 21) that we did not raise below the failure of the Utah Act to provide the procedural safeguards that are required when there is a prior restraint of speech, including a deadline for the administrative decision. Again respondent is mistaken. See ATA C. A. Br. 10, 16-17, 18.

5. In a similar vein, the Brief in Opposition attempts to make much of the way in which ATA is compensated by its clients (see, *e.g.*, Br. in Op. 8-10). Respondent never explains why this has any relevance to the constitutional issues before

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[4] The relevant passage from ATA's opening brief in the court of appeals is as follows; it leaves us at a loss to understand how respondent can say this argument was not raised below (ATA C.A. Br. 31):

> Fundraising counsel who are not paid do not need to register and obtain a license under the Act even though they would be assisting with the distribution of the very same petitions and letters. The protection of the First Amendment is in no way lost or diminished simply because American Target is paid for its services in the process of petition distribution. *See, Meyer v. Grant* [citation omitted]. The Act is in direct contravention of the holding in *Meyer v. Grant.*

the Court. Indeed, under *Meyer v. Grant*, *supra*, the fact that the Utah Act applies only to paid consultants, and not to those who are unpaid, is, as we showed in the petition, one of the things that makes it unconstitutional. See Pet. 12. For purposes of the principle of *Meyer v. Grant*, it is, of course, wholly immaterial how ATA is paid.

In any event, respondent's statements are, again, inaccurate. Respondent asserts that "[p]ayment for [ATA's] services is directly tied to contributions." Br. in Op. 5. But ATA's contract with Judicial Watch specifies that ATA is compensated for each letter sent, whether or not the recipient makes a contribution. See C.A. App. 19. In fact, in addition to being irrelevant, what respondent's discussion of ATA's compensation actually shows is that the state—which asserts that registration and disclosure requirements are needed to provide information to citizens about charitable solicitations—in fact cannot be trusted to provide a fair portrayal of what nonprofit organizations pay to their consultants.

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 14, 2000

Supreme Court, U.S.
FILED
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No. 99-1647

IN THE

Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Supreme Court Rule 15.8, petitioner American Target Advertising, Inc. ("ATA") files this Supplemental Brief.

On or about August 10, 2000, the United States Court of Appeals for the Eleventh Circuit issued a decision in *American Charities for Reasonable Fundraising Regulation et al. v. Pinellas County*, No. 97-02058 (Appendix A, infra). The *Pinellas County* case involved a constitutional challenge similar to the case at bar, with some exceptions, and augments the need for the Court to grant certiorari in the present case. In *Pinellas County*, the plaintiffs were a collection of various professionals and organizations. They sought to overturn the Pinellas County, Florida ordinance that requires registration of consultants who provide various services to nonprofit organizations that mail letters, which include a request for voluntary contributions, to the residents of Pinellas County. The plaintiffs—none of whom are located or conduct business in Pinellas County or Florida—challenged the ordinance under the First Amendment, the Commerce Clause and the due process clause of the Fourteenth Amendment of the United States Constitution. The Pinellas County ordinance (Ordinance No. 93-106, hereinafter, the "Ordinance") is, in certain key respects, similar to the Utah Charitable Solicitations Act (the "Utah Act") which is the subject of ATA's challenge in the present matter. *See*, Pinellas County Code Section 42-266 *et seq.* *See*, Appendix B, infra. Consultants must also obtain yet another license from the State of Florida Department of Agriculture and Consumer Services under the Solicitation of Contributions Act, Chapter 496, Florida Statutes, *prior* to submitting the licensing application to Pinellas County, according to the terms of the licensing application.

The Ordinance, like the Utah Act, requires registration of professional fundraising consultants, but unlike the Utah Act,

the Ordinance does not require such entities to submit a bond. Consultants must pay an annual licensing fee, which ranges from $20 to $120 based on the dollar amount of contributions that the consultant's nonprofit organization clients received in the preceding year. Consultants must file a detailed licensing application, a copy of which is attached in Appendix C, infra. Among the many requirements in the licensing application, consultants must submit the address, telephone number, date of birth and driver license number[1] of various officers and employees of the consulting entity.[2]

The Eleventh Circuit held, without any significant discussion, that the Pinellas County Ordinance is facially constitutional, but remanded the case to further address the as-applied challenge, specifically with regard to the due process challenge. The decision identifies numerous due process problems that the Eleventh Circuit directed the district court to consider on remand. The plaintiffs argued, as ATA has argued in the present matter, that out-of-state consultants that provide out-of-state services to nonprofit organizations in the conduct of the nonprofits' direct mail do not have the minimum contacts to subject the agency to licensing jurisdiction. The strongly worded remand indicates significant due process problems with the Pinellas County ordinance, but the record below needed further development.

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[1] In Virginia, at least, one's driver license number is also one's social security number (unless specifically requested otherwise). To the extent that the Pinellas County mandates the public filing of what are really social security numbers as a condition for the issuance of such license, it appears to violate the Privacy Protection Act, 5 U.S.C. 552(a) note (1977).

[2] It should be noted that in *Talley v. California*, 362 U.S. 60 (1960), the Court struck down an ordinance that prohibited the distribution of handbills that did not state the name and home address of the person who printed, wrote and/or distributed the literature. The decision notes that such disclosures "tend to restrict freedom to distribute information and thereby freedom of expression." *Id.*, at 64.

The holding that such licensing requirements are facially constitutional, however, highlights the need for the Court to grant certiorari in the present case.

ATA has maintained that such licensing laws are unconstitutional on their face. See Dist. Ct. App. 117-126, 278-280. ATA has addressed the legal reasons in detail. See Pet. 7-20. The consequences of the Eleventh Circuit's decision demonstrate the national importance of ATA's case, for it is not just one law in Utah that presents the problem, but the cumulative impact of the other states, counties and cities that have enacted similar laws as well. Unless such laws are declared unconstitutional on their face, consultants are faced with the expensive and burdensome process that the plaintiffs in the *Pinellas County* matter now face.

Consulting agencies like ATA and the plaintiffs in *Pinellas County* are forced not only to go from state to state, but now county to county—and perhaps city to city—to litigate their claims that such licensing laws are unconstitutional as applied to the given set of facts. That task is not merely burdensome: it is impossible as a practical matter. And even if it were possible, valuable First Amendment rights would be lost during the period of litigation under the very real scenario that the licensing jurisdictions could impose restrictions on nonprofit's mailing their letters pending outcome of the litigation. Like Utah, jurisdictions use such licensing laws to place prior restraints, without regard to the time, place or manner of the activity, on nonprofit organizations mailing to the residents of their respective jurisdictions pending issuance of the licenses.

In one sense, the plaintiffs in *Pinellas County* still have an opportunity to have the Ordinance declared unconstitutional. In a larger sense, however, the Eleventh Circuit's decision creates the need for consultants to litigate from county to county, which is perhaps the severest result that could obtain,

not just for consulting agencies, but for the courts as well.[3] Consultants that cannot afford to litigate in every county and state are faced with the option of complying with unconstitutional laws or severely restricting where their nonprofit clients can mail. That is likely to result in nonprofit organization's contracting only with a very limited number of consultants who can afford—both in terms of financing as well as the time needed to complete the extensive registration processes[4]—to register in what was conceivably, but now

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[3] Recently, a Kentucky county charitable solicitation ordinance was challenged in *Public Citizen et al. v. Jefferson County*, No. CV 369 (filed June 26, 2000), United States District Court for the Western District of Kentucky. The Plaintiffs also include Greenpeace and American Charities for Reasonable Fundraising Regulation (which is one of the plaintiffs in the *Pinellas County* case). While the cause of action differs in some respects from the present matter, the litigation involves a challenge to a county ordinance that requires nonprofit organizations to obtain a license before mailing into the county. The State of Kentucky already has its own charitable fundraising licensing law requiring registration, Kentucky Revised Statutes 367.650 *et seq.* The Jefferson County ordinance requires, among other things, that nonprofit organizations list the name, home address, telephone number and social security number of certain employees. The ordinance also requires nonprofit organizations to submit financial reports based on a calendar year, even if such organizations use a fiscal year to prepare their financial statements. The point of ATA's reference to the litigation is to emphasize that not only are there various states, counties and cities in which organizations must bring litigation to challenge the constitutionality of those laws, but those organizations that choose to register face myriad, disparate and burdensome registration and licensing requirements from jurisdiction to jurisdiction. Such multiple, diverse licensing laws, with their conflicting licensing requirements, compound the problems of compliance with these licensing laws for those organizations involved in national nonprofit direct mail campaigns.

[4] It is extremely important for the Court to keep in mind that the registration process is more extensive than merely completing and filing one registration document. As under the Utah Act, presuming the licensing application is accepted on the first attempt, registration laws require updates, including registering each new client when it is obtained, submitting financial reports each year, and re-registering annually.

more realistically, 6,000 jurisdictions in the United States. These surely are results that are unacceptable under the First Amendment, the Commerce Clause and the due process clause of the Fourteenth Amendment.

The pleas by these government entities, such as Pinellas County, that such burdensome laws are needed to protect their residents do not wash. Laws exist or may be enacted that accomplish those goals without the present scenario that will most certainly drive many consultants out of business, and prevent nonprofit organizations from disseminating their very valuable literature.

The *Pinellas County* decision is foreboding and creates even more urgency for the Court to review the constitutionality of charitable licensing laws. ATA respectfully suggests that the *Pinellas County* case emphasizes the need for the Court to grant certiorari in the present matter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 12, 2000

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APPENDIX A

[Filed August 10, 2000]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10945

D.C. Docket No. 97-02058-CIV-T-17B

AMERICAN CHARITIES FOR REASONABLE FUNDRAISING REGULATION, INC., THE CREATIVE ADVANTAGE, INC., *et al*,
Plaintiffs-Appellants,

versus

PINELLAS COUNTY, a political subdivision of the State of Florida, NUGENT WALSH, as chairperson of the Charitable Solicitations Board of Pinellas County, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(August 10, 2000)

Before EDMONDSON and MARCUS, Circuit Judges, and STROM*, District Judge.

PER CURIAM:

Plaintiffs challenge a local Pinellas County ordinance regulating the solicitation of charitable contributions. The

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* Honorable Lyle E. Strom, U.S. District Judge for the District of Nebraska, sitting by designation.

challenge is based on the Commerce Clause, the First Amendment, and the Fourteenth Amendment. The district court granted summary judgment for Defendant County concluding that the Ordinance was facially constitutional. We affirm in part, but because the district court failed to address Plaintiffs' as-applied challenge, we remand for consideration of that claim.

BACKGROUND

Pinellas County, Florida (Defendant County) passed Ordinance No. 93-106 (the "Ordinance"), pursuant to Fla. Stat. § 496.421, which grants authority to counties to enact ordinances regulating charitable solicitation. The ordinance, codified in Pinellas County Code §§ 42-266 to -344, regulates persons who solicit charitable contributions within the County.

The Ordinance requires fund-raising consultants and paid solicitors[1] to register with the County before performing services for their clients, who are charities soliciting within the County.[2] The Ordinance also prohibits a charity from

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[1] *Compare* Pinellas County Code § 42-266 (defining "professional fundraising consultant" as "any person who is retained by a charitable organization or sponsor for a fixed fee to plan, advise, consult, or prepare material for solicitation of contributions, but who does not manage, conduct, or carry on any fundraising activity or solicit contributions, or employ, procure, or engage any compensated person to solicit contributions and who does not at any time have custody or control of contributions"), *with id.* (defining "professional solicitor" as any person "who for compensation, performs for a charitable organization or sponsor any service in connection with which contributions are or will be solicited by the compensated persons . . . in connection with the solicitation of contributions for or on behalf of a charitable organization").

[2] *See* Pinellas County Code § 42-291(a) ("(n)o charitable organization, sponsor, commercial co-venturer, professional fundraising consultant, federated fundraising organization, professional solicitor, or other person

soliciting in the County if the charity contracts with a professional solicitor before that person has been issued the required permit. And it prohibits professional fund-raising consultants from soliciting in conjunction with a client-charity until that charity has registered with the County.[3]

Plaintiffs are American Charities for Reasonable Fundraising Regulation, Inc. ("American Charities"), the Creative Advantage, Inc. ("TCA"), and Norman W. Leahy ("Leahy").[4] Plaintiffs sought relief in district court to enjoin the enforcement of the Ordinance and to grant a declaratory judgment finding the Ordinance unconstitutional as violative of the First Amendment, the Fourteenth Amendment Due Process Clause, and the negative Commerce Clause. The

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. . . shall solicit contributions in the county by any means . . . without first registering and having been issued a charitable solicitations permit")

[3] Pinellas County Code § 42-321 provides:

> (b) It shall be a violation of this article for any professional solicitor, professional fundraising consultant, commercial co-venturer, federate fundraising agency or sponsor to solicit on behalf of or in connection with any affiliated or client charity before that charity or sponsor has registered and been issued a charitable solicitations permit as required in this article.
>
> (c) It shall be a violation of this article for any charity to contract with any professional solicitor, professional fundraising consultant, commercial co-venturer, federated fundraising agency, or sponsor for the purpose of raising or soliciting funds for the charity or sponsor before the professional solicitor, professional fundraising consultant, commercial co-venturer, federated fundraising agency, or sponsor has been issued a charitable solicitations permit by the department as required by this article.

[4] American Charities for Reasonable Fundraising Regulation is a membership association which brings this action on behalf of its members, who include professional fund-raising consultants. The Creative Advantage, Inc., is a full service direct mail fund-raising agency which consults with charities on fund-raising but does not directly solicit. Leahy is a copywriter, based in Virginia, who produces copy for charities.

district court denied relief, concluding that the Ordinance does not facially violate the Constitution, and granted summary judgment for Defendant. Plaintiffs appeal.

DISCUSSION

We review the district court's grant of summary judgment de novo. *See Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 995 (11th Cir. 1998). And we review de novo a constitutional challenge to a statute. *See Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1546 (11th Cir. 1997) (constitutionality of a statute is a question of law reviewed de novo).

The district court properly determined that Plaintiffs' facial challenges to the Ordinance were unavailing. *See American Charities for Reasonable Fundraising Regulation, Inc, v. Pinellas County*, 32 F. Supp.2d 1308 (M.D. Fla. 1998); *see also American Target. Advertising v. Giani*, 199 F.3d 1241 (10th Cir. 2000). The district court erred, however, in determining that Plaintiffs' due process as-applied challenge was not ripe for review. We conclude that the as-applied claim was ripe and that the County's application of the Ordinance to Plaintiffs may violate the Due Process Clause of the Fourteenth Amendment.

STANDING

The district court did not address Plaintiffs as-applied due process challenge because the court concluded that this claim was not ripe: the County had not sought to enforce the Ordinance against Plaintiffs. We conclude Plaintiffs offered sufficient evidence of a threat of enforcement to assert their as-applied challenge.

While pre-enforcement review is the exception, "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of

prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' " *Babbitt v. UFW*, 99 S. Ct. 2301, 2309 (1979); *see also Jacobs v. Florida Bar*, 50 F.3d 901, 904 (11th Cir. 1995) ("A plaintiff stating that he 'intends to engage in a specific course of conduct arguably affected with a constitutional interest, . . . does not have to expose himself to enforcement to be able to challenge the law.'"). To establish their standing to bring an as-applied challenge, Plaintiffs need to demonstrate that a "credible threat of an injury exists," not just a speculative threat which would be insufficient for Article III purposes. *Kirby v. Siegelman*, 195 F.3d 1285, 1290 (11th Cir. 1999). We have written that this standard can be met by showing that either "(1) [plaintiff] was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution." *Jacobs*, 50 F.3d at 904 (applying standard to conclude that plaintiffs had standing to bring as-applied challenge).

Plaintiffs offered sufficient proof of a credible threat of prosecution in this case. Plaintiffs offered the affidavit of Marilyn Price, president of Plaintiff TCA; the affidavit states that she had written the County asking whether her company had to register for a permit although TCA does not directly solicit contributions. In response, John Wood of the Regulatory Section of the Department of Consumer Protection for the County called. Wood said that, if a nonprofit mails into the County, it is mandatory for that organization and its professional fund-raising consultant (that is, TCA) both to register. Wood also explained that the penalty for noncompliance was a Civil injunction and possibly a $500.00 fine or imprisonment.[5] Price stated that, as

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[5] Plaintiffs also offered the affidavit of Raymond Grace. the president of Creative Direct Response ("CDR"), who stated that his company was contacted by the County and told that it must register and pay the fee as a

a direct result of this conversation, she has asked TCA's clients not to mail into the County, and TCA has refused to enter into consulting agreements with charities that mail into the County.

Defendants argue this affidavit is insufficient to show a threat of prosecution. Plaintiffs, however, did receive a response from someone "with the knowledge and authority to speak for the [County]" about registration.[6] *Digital Properties. Inc. v. City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997) (determining challenge not ripe because plaintiff had not applied for zoning permit and relied on statement that city "does not allow such use" made by one non-supervisory employee at zoning department to confirm plaintiff's assumption that zoning scheme applied to his proposal).[7] And Creative Direct Response ("CDR"), another fund-raising consulting organization, received a letter from the County

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professional fund-raising consultant. He was informed that, if his company failed to register, it could no longer advise on clients' direct mail appeals and that the company's clients could not conduct direct mail appeals in the County. And in responding to Leahy's inquiry, the County informed Leahy that he must register, even though he would only be providing copy to charities and would not be involved in telemarketing or other direct solicitations, if he would be providing copy to charities which mail into the County.

[6] The same John Wood, who informed TCA of its obligation to register, was cited as the source of Defendant's response to Plaintiffs' interrogatories. The response said that Plaintiffs would be required to register if their client charities solicited in the County and Plaintiffs perform services, or intend to perform services, for charities soliciting in Pinellas County.

[7] This case is materially different from *Digital Properties*, which involved a zoning permit and in which the court determined that plaintiffs as-applied challenge was not ripe because it was "founded upon [plaintiff's] anticipated belief that [city] would interpret [ordinance] in such a way as to violate [plaintiff]'s First Amendment rights." 121 F.3d at 590-91.

telling it to register. In addition, Defendant, in response to requests for admissions, admitted that TCA, Leahy, and ACFRFR—based on the evidence Defendant's had—are required by the County "to register as a PFC and pay a fee if its clients send charitable solicitations by mail into Pinellas County."

These circumstances assure us that this case "grows out of a genuine dispute and is not a contrivance prompted solely by a desire to enforce constitutional rights." *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 819 (5th Cir. 1979) (concluding justiciable challenge to airport solicitation ordinance applicable to plaintiffs in which penalty was loss of and inability to reapply for a solicitation permit); *see also Graham v. Butterworth*, 5 F.3d 496 (11th Cir. 1993) (concluding credible threat of prosecution because plaintiff intended to engage in protected conduct, which state seemed to proscribe).[8] Because we have determined that Plaintiffs as-applied due process challenge is ripe, we now address the merits of that claim.

DUE PROCESS CLAUSE

Plaintiffs say their activities, or lack thereof, in Pinellas County are insufficient for the County to apply the Ordinance to them in accordance with due process. Plaintiffs may be correct. But because we cannot determine from the record the extent of the contacts and whether they are sufficient, we remand for such a determination.

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[8] Defendants say this evidence is not sufficient because the Ordinance is not criminal. The Ordinance itself, however, provides that violations shall be punishable as provided in section 1-8 of the Pinellas County Code. Section 1-8(c) states: except as otherwise provided, "a person convicted of a violation of this Code shall be punished by a fine not to exceed $500.00 or by imprisonment in the county jail for a term not exceeding 60 days, or by both."

A state's legislative jurisdiction is circumscribed by the Due Process Clause: "There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction." *Hellenic Lines Ltd. v. Rhoditis*, 90 S. Ct. 1731, 1737 n.2 (1970) (Harlan, J., dissenting); *accord Adventure Communications Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 435-36 (4th Cir. 1999). The inquiry into whether sufficient legislative jurisdiction exists is similar to that explored in determining sufficient minimum contacts for the purposes of assessing whether a court cart exercise personal jurisdiction consistent with due process, or whether a court can apply a state's own law under choice-of-law analysis to a case consistent with due process. *See Adventure Cornmunications*, 191 F.3d at 436 (noting a substantial overlap in analysis); *Quiil Corp. v. North Dakota*, 1 12 S. Ct. 1904, 1909 (1992) (stating that due process "requires some definite link, some minimum connection, between state and the person, property or transaction it seeks to tax").[9]

To determine legislative jurisdiction, that is, to confirm that the application of the County's regulations to Plaintiffs does not offend due process, we look to choice-of-law and personal jurisdiction analyses. When choice-of-law issues arise in court, to apply a state's substantive law in accordance with due process, "that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor

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[9] Though the inquiries are similar, some difference exists between adjudicative jurisdiction and legislative jurisdiction. *See Adventure Communications*, 191 F.3d at 435 (noting that adjudicative jurisdiction "concerns the power of the state to resolve a particular dispute through its court system" and legislative jurisdiction "involves the authority of a state to make its law applicable to persons or activities").

fundamentally unfair." *Allstate Ins. Co. v. Hague*, 101 S. Ct. 633, 640 (1981). And, when a court is considering its personal jurisdiction, the exercise of jurisdiction does not offend due process if the pertinent party has "certain minimum contacts with [the jurisdiction] such that the maintenance of the [action] does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 66 S. Ct. 154, 158 (1945); *see Allstate Ins. Co.*, 101 S. Ct. at 642 n. 23 (stating "both inquiries are often closely related and to a substantial degree depend upon similar considerations"); *Adventure Communication*, 191 F.3d at 437 (noting that the existence of minimum contacts is "significant factor" in determining if application of state's substantive law is constitutional).

Applying these standards to the question before us now, we ask whether sufficient contacts exist between the Plaintiffs and the County, "creating state interests such that it would not be fundamentally unfair to subject" the Plaintiffs to the County's registration requirements. *Adventure Communication*, 191 F.3d at 437. Therefore, a "minimum contacts" inquiry is necessary for determining whether the County's exercise of legislative jurisdiction, in this case, offends due process.

The regulated party must have performed some act by which it "purposefully avails itself of the privilege of conducting activities within the [County]." *Burger King v. Rudzewicz*, 105 S. Ct. 2174, 2184 *(1985)*. But the unilateral act of a third party is not sufficient to create the requisite contacts. *See id.* at 21 83; *see also Madara v. Hall*, 91 6 F.2d 1510, 1517 (11th Cir. 1990) (foreseeability required to exercise jurisdiction is "not the ability to see that the acts of third parties may affect the forum, but rather that the [actor's] own purposeful acts will have some effect in the forum").

Defendant has indicated that a consultant who advises a client who solicits in the County is required to register.[10]

But the record, in this case, seems to show only that Plaintiffs assist charities that send national mailings to the general public: Plaintiffs themselves do not send mailings to the public. Plaintiffs aver that they do not solicit, do not handle the funds, and are not paid on a percentage of the contributions basis.[11] Nothing apparently indicates that Plaintiffs purposefully aid the solicitation of funds from the citizens of Pinellas County, in particular as opposed to general solicitations conducted more or less nationally.[12] An

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[10] The district court determined that it was the overt act of solicitation and not advising which triggered the requirement that the professional fund-raising consultant obtain a permit. Plaintiffs, however, argue they do not solicit in the County nor purposefully contribute to the solicitation of funds in the County. The district court should explore on remand the extent of Plaintiffs' solicitation, or lack thereof, in the County.

In addition, the district court noted that the Ordinance itself requires a professional fundraising consultant to obtain a permit when it "solicits contributions in the county by any means." But the definition of professional fund-raising consultant provided for in the Ordinance limits the consultant category to persons who do not solicit, but instead "plan, advise, consult or prepare material for solicitation." Therefore, acts much less than overt solicitation could require consultants to obtain a permit, and the Ordinance has been so interpreted by the County in this case.

[11] For example, Plaintiffs state, in their briefs, that Leahy only writes copy: "Once he sells his copy, his involvement with that particular project ends and he moves on to the next one. He does not design the graphics, layout, or the other visual aspect of solicitation pieces. He does not maintain mailing lists. He does not help his clients select mailing lists. He does not mail letters. He does not target solicitations."

[12] For example, Defendant's admissions state that TCA, Leahy, and ACFRFR are required by the County to register if its clients send charitable solicitations by mail into the County. In response to interrogatories, Defendant stated that consultants are not required to register if they do not represent clients that do not solicit charitable contributions in the County.

abstract, indirect, and unaimed level of involvement with the County would not be sufficient for the County to regulate Plaintiffs.[13]

The circumstances in this case seem very different from those found to be sufficient for due process purposes in the case of *American Target Advertising* 199 F.3d at 1255, in which Utah law was allowed to be applied to a Virginia charitable consultant. in that case, the court determined that the Virginia plaintiff purposefully directed its efforts toward residents of Utah in particular: for example, consultant would suggest a list of potential Utah donors. *See id.*, In this case, Defendant has not alleged that Plaintiffs purposefully direct their efforts to, or specifically advise on solicitations aimed at, Pinelias County. *See Asahi Metal Indus. v. Superior Court of Cal., Solano County*, 107 S. Ct. 1026, 1032 (1987) (stating that even if defendant was aware product would eventually reach forum state via stream of commerce this awareness does not constitute an act purposefully directed toward forum state); *see also SEC v. Carrillo*, 115 F.3d 1540, 1545 (11th Cir. 1997) (noting that it is well established that advertising "reasonably calculated to reach the forum" may be pur-

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[13] In addition, Defendant claims it is proper to require Plaintiffs to register because their compensation must come from contributions received from their charity clients. Without more, an assertion that Plaintiffs were paid with general funds of their clients which funds at one time were contributions from someplace is insufficient to establish legislative jurisdictional minimum contacts. The district court cited *Interfase Marketing, Inc. v. Pioneer Technologies Group. Inc.*, 774 F. Supp. 1355, 1358 (M.D. Fla. 1991), for the proposition that merely receiving a benefit from the residents of the jurisdiction should subject a party to the court's jurisdiction. But in that case a number of "Contacts" existed between the jurisdiction and defendant: defendant traveled to the jurisdiction, conducted business there, and permitted its affiliate to solicit potential customers for it in the jurisdiction. *See id.* ("[Defendant] clearly seeks the benefits of marketing their product in Florida through their relationship with [affiliate].").

poseful availment, as can direct solicitation mailings); *Associated Transport Lines Inc. v. Productos Fitosanitarios Proficol El Carmen SA.*, 197 F.3d 1070, 1075 (11th Cir. 1999) (noting that "awareness that product will enter state is not enough to satisfy due process—not the kind of purposeful activity required").[14] For now at least, we can not say that Plaintiffs have sufficient contacts with the County to regulate them under this Ordinance, consistent with due process.

The district court did not reach Plaintiffs' as-applied challenge. And, the district court should tackle the question before we attempt to do so finally. Because unanswered questions remain on the extent of Plaintiffs' contacts with the County, we REMAND the case to the district court for a determination, not inconsistent with this opinion, of whether Defendant's threatened application and enforcement of the Ordinance violates due process. Otherwise, we AFFIRM the district court's judgment.

AFFIRMED IN PART,

VACATED AND REMANDED IN PART.

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[14] And just having some contract with a registered charity without more is not sufficient, under the Constitution, to subject these other entities to regulation and registration by the Ordinance. *See Borg-Warner Acceptance Corp. v. Lovett & Thorpe. Inc.*, 786 F.2d 1055, 1059 (11th Cir. 1986) (" '[m]erely entering into a contract with a forum resident does not provide the requisite contacts between a [party] and the forum state."); *Sea Lift. Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989, 993 (11th Cir. 1986)("Nor does the existence of a contract between the foreign defendant and a resident of the forum state automatically amount to 'purposeful availment.' ").

APPENDIX B

CODE AND LAND DEVELOPMENT CODE
County of PINELLAS COUNTY, FLORIDA
Codified through Ord. No. 00-37,
enacted May 2, 2000. (Suppl

PART II PINELLAS COUNTY CODE

Chapter 42 CONSUMER PROTECTION*

ARTICLE VII. CHARITABLE SOLICITATIONS*

DIVISION 1. GENERALLY

Sec. 42-266. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Charitable organization means any person who is or holds himself out to be established, for profit or not for profit, for any benevolent, educational, philanthropic, humane, scientific, artistic, patriotic, social welfare or advocacy, public health, environmental conservation, civic, safety, fraternal, historical, athletic, medical, religious or other eleemosynary purpose, or any person who in any manner employs a charitable appeal as the basis for any solicitation or an appeal that suggests that there is a charitable purpose to any solicitation. Such term includes a chapter, branch, area office, or similar affiliate soliciting contributions within the county for a charitable organization.

Charitable purpose means any benevolent, philanthropic, patriotic, educational, humane, scientific, artistic, public health, social welfare or advocacy, environmental conservation, civic, safety, fraternal, historical, athletic, medical, religious or other eleemosynary objective.

Charitable sales promotion means an advertising or sales campaign conducted by any person, professional solicitor, federated fundraising organization, commercial co-venturer, professional fundraising consultant, or sponsor which represents that the purchase or use of goods or services offered by the person, professional solicitor, federated fundraising organization or sponsor is to benefit a person or charitable or sponsor organization; provided, that advertising services to a charitable or sponsor organization does not, in itself, constitute a charitable sales promotion.

Code enforcement officers means those employees of the department of consumer protection designated as code enforcement officers pursuant to F.S. § 125.69.

Commercial co-venturer means any person who regularly and primarily is engaged in trade or commerce other than in connection with solicitation of contributions and who conducts a charitable sales promotion or a sponsor sales promotion.

Contribution means the promise, pledge, or grant of any money, property, financial assistance, service, or any other thing of value in response to a solicitation by any person on behalf of a charitable or sponsor purpose. "Contribution" includes, in the case of an offer of goods or services to the public, the difference between the direct cost of the goods or services and the price at which the goods or services are resold to the public. "Contribution" does not include fees, dues, or assessments paid by members, provided that membership is not conferred solely as consideration for making a contribution in response to a solicitation. "Contribution" does not include funds obtained by a charitable organization or sponsor pursuant to government grants or contracts.

Conviction means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or imposition of sentence was suspended, in connection with any federal, state or local ordinance, act, or law regulating theft, fraud, misrepresentation or the solicitation of funds.

Department means the Pinellas County Department of Consumer Protection.

Direct collection campaign means any solicitation of funds on or on behalf of a charitable organization where a pledge or donation for the charitable organization is collected by any person without use of the mail.

Director means the director of the Pinellas County Department of Consumer Protection.

Educational institutions and organizations means those institutions described in F.S. § 212.08(7)(o)2.d.

Emergency service employee means any employee who is a firefighter, as defined in F.S. § 633.30, or ambulance driver, emergency medical technician, or paramedic, as defined in F.S. § 401.23.

Federated fundraising organization means a federation of independent charitable organizations which have voluntarily joined together, including, but not limited to, a United Way or community chest, for purposes of raising and distributing contributions for and among themselves, and where membership does not confer operating authority and control of the individual organization upon the federated group organization.

Financial record means computer records, banking records and statements, checks, drafts, receipts and papers of any description which indicate the receipt or expenditure of contributions.

Fundraising costs means those costs incurred in inducing others to make contributions to a charitable organization or sponsor. "Fundraising costs" include, but are not limited to, salaries, commissions, rent, telephone service, acquiring and obtaining mailing lists, printing, mailing, medical expenses and all direct and indirect costs of soliciting, as well as the cost of unsolicited merchandise sent to encourage contributions.

Hearing means, subsequent to public notice, a proceeding regarding the denial of a permit application, the suspension of a permit, or the revocation of a permit under this article.

Law enforcement officer means any person who is elected, appointed, or employed by the federal government, the state or any political subdivision thereof, and:

(1) Who is vested with authority to bear arms and make arrests and whose primary responsibility is the prevention and detection of crime or the enforcement of the criminal, traffic, highway, marine, and fish, game and wildlife laws of the state; or

(2) Whose responsibility includes supervision, protection, care, custody, or control of inmates within a reasonable institution.

Mail means a system by which letters and other materials are transported by the U. S. Postal Service or any private carrier.

Membership means the relationship of a person to an organization that entitles him to the privileges, professional standing, honors, or other direct benefit of the organization in addition to the right to vote, elect officers, and hold the office in the organization.

One time event means an event to raise funds for a charitable organization which does not exceed three consecutive calendar days annually.

Owner means any person who has a direct or indirect interest in any professional solicitor, professional fundraising consultant, federated fundraising organization or sponsor.

Parent organization means that part of a charitable organization or sponsor which coordinates, supervises, or exercises control over policy, fundraising, and expenditures or assists or advises one or more chapters, branches, or affiliates of such organization.

Person means any individual, organization, trust, foundation, group, association, entity, partnership, corporation, sponsor, or society, and the agent(s), employee(s) or officer(s) of any such person.

Professional fundraising consultant means any person who is retained by a charitable organization or sponsor for a fixed or variable fee or percentage fee to plan, advise, consult, or prepare material for solicitation of contributions, but who does not manage, conduct, or carry on any fundraising activity, or solicit contributions, or employ, procure, or engage any compensated person to solicit contributions and who does not at any time have custody or control of contributions. A volunteer, employee or salaried officer of a charitable organization or sponsor is not a professional fundraising consultant. An attorney, investment counselor, or banker who advises an individual, corporation, or association to make a charitable contribution is not a professional fundraising consultant as the result of such advice.

Professional solicitor means any person who, for compensation, performs for a charitable organization or sponsor any service in connection with which contributions are or will be solicited by the compensated person or by any person it employs, procures, or otherwise engages, directly or indirectly, as an agent, employee, independent contractor or subcontractor, in connection with the solicitation of contributions for or on behalf of a charitable organization or sponsor. A volunteer, employee or salaried officer of a charitable organization or sponsor is not a professional solicitor. An attorney, investment counselor, or banker who advises an individual, corporation, or association to make a charitable contribution is not a professional solicitor as the result of such advice. Any person, corporation, association or other organization which places advertising, or prepares or manages a mailing campaign, and sends materials to the public for the purpose of soliciting funds by charitable organization or a sponsor, or any person that conducts any direct collection campaign shall be considered a professional solicitor and not a professional fundraising consultant.

Religious institution means any church, ecclesiastical or denominational organization, or established physical place for worship, at which nonprofit religious services and activities are

regularly conducted and carried on, and includes those religious groups which do not maintain specific places of worship. "Religious institution" also includes any separate group or corporation which forms an integral part of a religious institution which is exempt from federal income tax under the provisions of section 501(c)(3) of the Internal Revenue Code, and which is not primarily supported by funds solicited outside its own membership or congregation.

Solicitation means a request, direct or indirect, for money, property, financial assistance, service, or any other thing of value on the plea or representation that such money, property, financial assistance, service, or other thing of value or a portion of it will be used for a charitable or sponsor purpose or will benefit a charitable organization or sponsor. "Solicitation" includes, but is not limited to, the following methods of requesting or securing the promise, pledge, or grant of money, property, financial assistance, service, or any other thing of value:

(1) Any oral or written request;

(2) Distributing, circulating, posting, or publishing any handbill, written advertisement, or other publication that directly or by implication seeks to obtain any contributions; or

(3) Selling or offering or attempting to sell any advertisement, advertising space, book, card, coupon, chance, device, magazine, membership, merchandise, subscription, sponsorship, flower, admission, ticket, food, or other service or tangible good, item, or thing of value, or any right of any description in connection with which any appeal is made for any charitable organization or sponsor and is used or referred to in any such appeal as an inducement or reason for making the sale or when, in connection with the sale or offer or attempt to sell, any statement is made that all or part of the proceeds from the

sale will be used for any charitable or sponsor purpose or will benefit any charitable organization or sponsor. A solicitation is considered as having taken place whether or not the person making the solicitation receives any contribution. A solicitation does not occur when a person applies to the government or to an organization that is exempt from federal income taxation under section 501(c) of the Internal Revenue Code for a grant or an award.

Sponsor means a group which hosts an event or solicits contributions on behalf of a charitable organization.

Violation means that a person has committed a prohibited act under F.S. ch. 496, this article, or any other federal, state or local ordinance, act, or law governing theft, fraud, misrepresentation or the solicitation of funds.

(Ord. No. 93-106, § 1.9, 12-7-93; Ord. No. 97-32, § 1, 5-13-97; Ord. No. 98-108, § 1, 12-22-98)

Cross reference(s)—Definitions generally, § 1-2.

Sec. 42-267. Authority.

This article is enacted pursuant to F.S. chs. 125 and 496, and under the home rule powers of the county in the interest of the health, peace, safety, and general welfare of the people of the county.

(Ord. No. 93-106, § 1.2, 12-7-93)

State law reference(s)--General powers of chartered counties, Fla. Const. art. VIII, § 1(g).

Sec. 42-268. Penalty for violation of article.

Violations of this article are punishable as provided in section 18.

(Ord. No. 93101, §§ 4.4, 5.4, 12-7-93)

Sec. 42-269. Territory embraced.

All territory within the legal boundaries of the county, including all incorporated and unincorporated areas, shall be embraced by the provisions of this article.

(Ord. No. 93-106, § 3, 12-7-93)

Charter reference(s)--Conflicts between county and municipal ordinances, §§ 2.01, 2.04.

Sec. 42-270. Purpose and intent.

The intent of the board of county commissioners in adopting this article is to require registration and full public disclosure by persons who solicit contributions for a charitable or sponsor purpose from the public within the legal boundaries of the county. It is further the intent of the board of county commissioners that the information required under this article be made available to the public in order to prevent deception, fraud, or misrepresentation in the solicitation, use and reporting of contributions.

(Ord. No. 93106, § 1.4, 12-7-93)

Sec. 42-271. Construction of article.

This article shall be liberally construed to accomplish its purpose.

(Ord. No. 93-106, § 1.5, 12-7-93)

Sec. 42-272. Exemptions from article.

(a) This article shall not apply to any solicitation made when the solicitation is directed toward persons who are members of the entity at the time of the solicitation.

(b) This article shall not apply to any solicitation for the relief of any individual specified by name at the time of the solicitation where the solicitor establishes a legal depository account and represents in each case that the entire amount collected, without any reduction whatever, shall be turned over to the named beneficiary.

(c) This article shall not apply to any solicitations conducted by schoolchildren or college or university students, or their parents, teachers or instructors under the direction and supervision of

their parents, school, college or university officials, teachers, instructors, or principals for the purpose of financing extra-curricular, social, athletic, artistic, scientific, or cultural programs which shall include, but shall not be restricted to, solicitations for band and athletic uniforms, scientific and/or artistic implements and literary matter.

(d) This article shall not apply to state agencies or other governmental entities.

(e) The exemptions in this section do not apply to any sponsor or to a person or group which is or holds out to be soliciting contributions by the use of any name which implies that the group or person is in any way affiliated with or organized for the benefit of emergency services employees or law enforcement officers.

(Ord. No. 93-106, § 1.6, 12-7-93; Ord. No. 97-32, § 2, 5-13-97; Ord. No. 98-108, § 2, 12-22-98)

Secs. 42-273—42-275. Reserved.

Sec. 42-276. Powers and responsibilities of the department of consumer protection.

(a) The code enforcement officer shall register any person and grant or renew a charitable solicitations permit upon compliance with this article.

(b) Upon complaint of any person, or upon his own initiation, if probable cause exists to suspect a violation of this article, the code enforcement officer may investigate any person to determine whether such person has violated any provision of this article.

(c) The director of the department of consumer protection shall promulgate the forms deemed necessary to carry out his or her responsibilities.

(d) The code enforcement officer may request, for purposes of inspection and investigation, all financial records of any person

which pertain to the solicitation and expenditure of contributions received for a charitable or sponsor purpose.

(e) The director may deny, suspend or revoke the charitable solicitations permit of any person for any violation of this article. The director shall notify the permit holder in writing of his or her basis for the decision.

(f) The code enforcement officer may cite, in accordance with F.S. 1 125.69, any person whom he determines is violating this article or is engaging in a prohibited act under this article.

(Ord. No. 93-106, § 2.2, 12-7-93; Ord. No. 97-32, § 6, 5-13-97).

Sec. 42-277. Reserved.

Sec. 42-278. Review of decisions by the director.

Any decision by the director pursuant to this article may be reviewed as a matter of right by the circuit court upon the filing of an appropriate pleading by an aggrieved party.

(Ord. No. 93-106, § 5.2, 12-7-93; Ord. No. 98-108, § 4, 12-22-98)

Sec. 42-279. Service of notice; public records.

(a) Any notice required under this article shall be in writing and sent by certified mail or hand delivery to the mailing address set forth on the application for the charitable solicitations permit. This mailing address shall be considered the correct mailing address unless the department has been otherwise notified in writing.

(b) Any information contained in a permit application under division 2 of this article is subject to the public records law, F.S. ch. 119.

(Ord. No. 93-106, § 5.3, 12-7-93; Ord. No. 97-32, § 8, 5-13-97; Ord. No. 98-108, § 5, 12-22-98)

Sec. 42-280. Responsibility for compliance with article.

It is the responsibility of the permit holder, his agent, employee or officer to ensure compliance with this article and F.S. ch. 496, notwithstanding the issuance of an occupational license or any other governmental permit.

(Ord. No. 93-106, § 4.4.3, 12-7-93)

Secs. 42-281—42-290. Reserved.

DIVISION 2. APPLICATION AND PERMIT

Sec. 42-291. Required.

(a) No charitable organization, sponsor, commercial co-venturer, professional fundraising consultant, federated fundraising organization, professional solicitor, or other person, unless otherwise exempted, shall solicit contributions in the county by any means or have funds solicited on its behalf by any other person without first registering and having been issued a charitable solicitations permit by the department under this article.

(b) No commercial co-venturer shall engage in charitable or sponsor solicitation activity without first determining that the charity or sponsor has complied with the registration requirements of this article, and without written permission of the charity or sponsor.

(Ord. No. 93-106, § 2.3, 12-7-93; Ord. No. 97-32, § 10, 5-13-97; Ord. No. 97-65, § 1, 8-12-97)

Sec. 42-292. Contents of; fee; incomplete application.

(a) Application required. Any charitable organization, sponsor, commercial co-venturer, professional fundraising consultant, federated fundraising organization, professional solicitor, or person desiring to engage in solicitation of contributions in the county shall file a sworn application with the department, which contains the following information and shall be accompanied by the following documents:

Sec. 42-292. Contents of; fee; incomplete application.

(1) If the applicant is:

a. An individual, the individual shall state his legal name and any aliases;

b. A group, the group shall state its legal identity;

c. A partnership, the partnership shall state its complete name and any fictitious name, and the names of all partners having either direct, managerial, supervisory or advisory responsibilities for the solicitation of charitable contributions, and whether the partnership is general or limited; or

d. A corporation, the corporation shall state its complete name and any fictitious name, the date of its incorporation, evidence that the corporation is in good standing, the names and capacity of all officers, directors, and stockholders having either direct, managerial, supervisory or advisory responsibilities for the solicitation of charitable contributions and, if applicable, the name of the registered corporate agent and the address of the registered office for service of process.

(2) Whether the applicant or any other individual listed pursuant to subsection (a)(1) of this section is registered under this article or any other solicitations statute or ordinance, and if so, the name(s) of the registering agency and the other permit holders.

(3) Whether the applicant or any other individual listed pursuant to subsection (a)(1) of this section has, within the five-year period immediately preceding the date of the application for registration, been convicted of a violation of F.S. ch. 496, this article, or any other federal, state or local ordinance, act or law governing theft, fraud, misrepresentation or the solicitation of funds, and if so, the conviction involved, the date of conviction, and the place of conviction.

(4) Whether the applicant or any other individual listed pursuant to subsection (a)(1) of this section has had a previous permit under this article or registration under F.S. ch. 496 suspended, revoked, or denied, or by court order been required to cease operation, or been fined or otherwise administratively sanctioned, including the date of the actions.

(5) The applicant's date of birth, mailing address, physical street address, telephone number and either the driver's license number and the state of issue or the federally issued identification number of the individuals listed pursuant to subsection (a)(1) of this section.

(6) If applicable, the applicant's statement of agreement or letter of authorization made with any commercial co-venturer, federated fundraising organization, professional fundraising consultant, professional solicitor, or sponsor, together with a copy of such agreement.

(7) A statement as to whether any of the owners, directors, officers, or employees of the registrant are related as parent, spouse, child, or sibling to any other directors, officers, owners, or employees of the applicant, or to any officer, director, trustee, or employee of any charitable organization or sponsor under contract to the registrant, or to any supplier or vendor providing goods or services to any charitable organization or sponsor under contract to the applicant.

(8) A copy of the registration or exemption statement issued under F.S. ch. 496 to the applicant or any other individual listed pursuant to subsection (a)(1) or (a)(2) of this section.

(9) Either a copy of the Internal Revenue Service form 990 and schedule A filed for the preceding financial year, a copy of the Internal Revenue System form 990-EZ filed for the preceding financial year, a copy of the Internal Revenue Service Form 1120-T filed for the preceding financial year, or proof of an exemption from filing any of the above forms. Any organization exempt from filing any of the IRS forms shall file a report of

results on a form provided by the department or an unaudited financial statement for the preceding financial year. A newly formed organization shall file an itemized budget certified by a senior officer.

(10) A sworn statement attesting to the veracity and accuracy of the information provided in the application.

(11) The application shall also contain the following information about the charitable organization:

a. The purpose or work of the organization; and

b. The manner in which the purpose or work of the organization is carried out.

(12) The application shall also contain the following information regarding each activity involving solicitation:

a. The name of the solicitation;

b. The manner or method of solicitation;

c. The contemplated receipts and expenses of the solicitation;

d. The proportion of the contribution which will go toward the object of the solicitation;

e. The distribution plan for collected contributions;

f. A written copy of the wording of any verbal solicitation; and

g. Copies of printed solicitation materials.

(b) Application fee. Each application for a charitable solicitations permit shall be accompanied by a nonrefundable fee which shall be set by resolution of the board of county commissioners. The resolution shall include a late fee for applications filed after the date of the expiration of a permit. Calculation of the appropriate fee shall be determined by adding the total of direct public support, indirect public support, and net

proceeds from the sale of goods and fundraising events in Pinellas County as reported on the organization's Internal Revenue Service form. The board of county commissioners may assess a separate fee for one-time events for which the purpose is raising funds for a charitable organization.

(c) Incomplete application. If the application for a charitable solicitations permit is not properly completed, the code enforcement officer shall notify in writing the person designated for service in the application. The applicant then has 15 days from the date of such notice to properly complete the application. Failure to respond within 30 days to a request for information necessary to complete the application shall result in a denial of the application.

(Ord. No. 93-106, § 2.4, 12-7-93; Ord. No. 97-32, § 11, 5-13-97; Ord. No. 97-65, § 2, 8-12-97; Ord. No. 98-108, § 7, 12-22-98) Sec. 42-293. Grant; denial.

(a) Time period for granting or denying.

Sec. 42-293. Grant; denial.

(1) The code enforcement officer shall grant a new or renewal charitable solicitations permit within 30 days from the date of its proper filing.

(2) The director or his or her designee shall mail a notice of intent to deny a charitable solicitations permit within 30 days from the date of its filing.

(3) The director shall send a notice of denial based on any of the grounds set forth in subsection (c) of this section, or for failure to correct within 15 days any of the deficiencies contained in the notice of intent to deny as set forth in subsection (a)(2) of this section.

(4) Any applicant who received a notice of denial of a charitable solicitations permit may request a hearing before the Director within 15 days of the date of the mailing of the notice of denial.

(b) Granting of permit. If there is no basis for denial of a charitable solicitations permit pursuant to subsection (c) of this section, the code enforcement officer shall grant the permit, notify the applicant, and issue the permit to the applicant upon payment of the appropriate annual fee.

(c) Denial of permit. The director shall deny a charitable solicitations permit on the basis of any one of the following grounds:

(1) An applicant has been convicted of a violation of F.S. ch. 496, this article, or any other federal, state or local ordinance, act or law governing theft, fraud, misrepresentation, or the solicitation of funds within three years of the latest application.

(2) An applicant has had a registration issued under F.S. ch. 496 or a permit issued under this article revoked within three years of the latest application.

3)An applicant has had a registration issued under F.S. ch. 496 or a permit issued under this article suspended twice within two years prior to the pending application.

(3) An applicant has submitted an application which contains material false information.

(4) An applicant has submitted an application which contains material false information.

(5) An applicant has submitted an application which omits material information.

(Ord. No. 93-106, § 2.5, 12-7-93; Ord. No. 97-32, § 12, 5-13-97; Ord. No. 98-108, § 8, 12-22-98)

Sec. 42-294. Contents of permit; term; renewals; expiration.

(a) Contents. A charitable solicitations permit shall state on its face the name of the permit holder, the name of the charity or sponsor for whom charitable solicitations are to be made, the street address of the principal place of business, the date of issuance, and the date of expiration.

(b) Term. All permits issued under this article shall be valid for 12 months from the date of issuance, except for one-time events.

Sec. 42-294. Contents of permit; term; renewals; expiration.

(c) Renewals. Subject to the other provisions of this article, a permit holder may renew the charitable solicitations permit by submitting a renewal application under oath and by submitting the financial information required and paying the appropriate fee.

(1) If a permit holder fails to apply to renew the permit on or before the expiration date of the permit, the permit holder shall complete a late renewal application and be charged a late fee as set by resolution of the board of county commissioners.

(2) No charitable solicitations permit shall be renewed if a permit holder fails to comply with the reporting requirements of this article.

(d) Expiration. A permit that is not renewed under this article shall expire one year from the date of issuance.

(Ord. No. 93-106, § 2.6, 12-7-93; Ord. No. 97-32, §13, 5-13-97; Ord. No. 98-108, §9, 12-22-98)

Sec. 42-295. Records; reporting requirements; consent.

(a) Records.

(1) Each permit holder under this article shall maintain true and accurate financial records whereby all contributions and all disbursements are clearly entered upon the financial records. The records must be made available, without subpoena, to the code enforcement officer for inspection and copying and must be furnished no later than 15 working days after requested.

(2) Each permit holder under this article shall keep the required financial records for at least three years, pursuant to Section 42-295(a)(1).

(b) Reporting requirements.

(1) Each permit holder whose solicitation is ongoing throughout the year, and:

a. Whoever is required to submit a new charitable solicitations application as opposed to a renewal application shall, six months from the date of issuance of the permit, submit to the code enforcement officer a financial statement which shows all contributions and expenses and for what uses all such contributions were or are to be disbursed or distributed; or

b. Whoever is required to submit a renewal application shall, 12 months from the date of issuance of the second or subsequent permit, submit to the code enforcement officer the documents listed in section 42-292(a)(9) of this code and for what uses all such contributions were or are to be disbursed or distributed.

(2) Regarding solicitations made within Pinellas County:

a. Each professional solicitor and federated fundraising organization shall report to the code enforcement officer the amount raised from its solicitation on behalf of each charitable organization or sponsor, and the amount received from each charitable organization or sponsor as payment for services rendered.

c. Each professional fundraising consultant shall report to the code enforcement officer the amount received from each charitable organization or sponsor as payment for services rendered.

d. Each commercial co-venturer shall report to the code enforcement officer the amount received from the fundraising activity or event, and the amount turned over to the charitable organization or sponsor.

(3) Each permit holder whose solicitation is a single, discreet solicitation within a year shall, within 30 days after termination

of the permitted solicitation, submit to the code enforcement officer the documents listed in section 42-292(a)(9) of this code and for what uses all such contributions were or are to be disbursed or distributed.

(4) Whenever the information required by or provided under this division has changed, the permit holder shall, within 15 days of the change, provide the code enforcement officer in writing with the changed information.

(c) Consent. By holding a permit under this article, the permit holder shall be deemed to have consented to the provisions of this article and to the exercise by the director and code enforcement officers of their respective responsibilities under this article.

(Ord. No. 93-106, § 2.7, 12-7-93; Ord. No. 97-32, § 14, 5-13-97; Ord. No. 98-108, § 10, 12-22-98)

Sec. 42-296. Suspension or revocation of permit.

(a) In the event that the director or his or her designee learns or finds upon sufficient cause that a permit holder is violating or has violated the provisions in division 3 or 4 of this article, the director or his or her designee shall promptly notify the permit holder of the violation and shall allow the permit holder a 15-day period in which to correct the violation.

(b) If the permit holder fails to correct a violation of this article before the expiration of the 15-day period provided under subsection (a) of this section, the director shall issue a notice of suspension or revocation of the charitable solicitations permit.

(c) Any permit holder who receives a notice of suspension or revocation of the charitable solicitations permit may request a hearing before the director of the department of consumer protection, which hearing shall be held within thirty (30) days of the issuance of the notice of the permit holder's violation.

(d) The director shall hold a hearing and, at the hearing, the code enforcement officer shall have the burden to show competent and substantial evidence to support the decision to

issue a notice of the permit holder's violation, based on the information available to the code enforcement officer at the time of his or her decision.

(e) The permit holder shall immediately surrender the permit to the director upon suspension or revocation of the permit by the director.

(f) During the suspension or revocation of its charitable solicitations permit, the permit holder shall not solicit for a charitable or sponsor purpose in Pinellas County.

(g) A suspension shall be for a period of one year, beginning on the date the director notifies the license holder of the suspension, and shall require a new application for reinstatement.

(h) Pursuant to section 42-293(c)(2) of this Code, any revocation of a license issued under this article shall be for a minimum time period of three years.

(Ord. No. 93-106, § 2.8, 12-7-93; Ord. No. 97-32, § 15, 5-13-97; Ord. No. 97-65, § 3, 8-12-97; Ord. No. 98-108, § 11, 12-22-98) Secs. 42-297—42-305. Reserved.

DIVISION 3. OPERATIONAL PROVISIONS

Sec. 42-306. Telephone solicitations.

(a) When conducting telephone solicitations for charitable or sponsor purposes, the permit holder shall furnish to each contributor an invoice, receipt, or statement containing the name of the organization benefitting from the solicitation, the name of the soliciting organization, the full legal name of the individual who made the solicitation and the business address and telephone number from which the solicitation was made.

(b) When conducting telephone solicitations for charitable or sponsor purposes, a professional solicitor and his agent(s) or employee(s) shall immediately identify himself to the listener with his full name and the name of the professional solicitor

organization before he solicits any person for a charitable or sponsor contribution.

(Ord. No. 93-106, §3.1, 12-7-93)

Sec. 42-307. Identification of solicitor.

Any person seeking contributions under this article shall identify himself with his full, true and correct name.

(Ord. No. 93-106, §3.2, 12-7-93)

Sec. 42-308. Contribution receipts.

(a) Any person accepting a contribution for any charitable or sponsor purpose shall tender to the contributor a receipt which acknowledges the amount and species of the contribution, the name of the organization for whom the contribution is made, the full name of the individual who made the solicitation, and the business address and telephone number from which the solicitation was made.

(b) The receipt required by this section shall not be necessary for contributions made through receptacles, nor shall a receipt be necessary for a contribution of less than $5.00.

(Ord. No. 93-106, § 3.3, 12-7-93)

Sec. 42-309. Contribution receptacles.

Each contribution receptacle which is unattended by the person or organization soliciting contributions shall bear the person's or organization's name, address and telephone number and the following disclosure language in boldfaced, legible type:

Registered under Pinellas County Ordinance.

REGISTRATION DOES NOT IMPLY ENDORSEMENT.

For information call the County Department of Consumer Protection.

The disclosure must include the current phone number of the department of consumer protection.

Ord. No. 93-106, § 3.4, 12-7-93; Ord. No. 97-32, § 16, 5-13-97; Ord. No. 98-8, § 3, 1-6-98)

Secs. 42-310—42-320. Reserved.

DIVISION 4. PROHIBITED ACTS

Sec. 42-321. Charitable solicitation without a valid permit.

(a) It shall be a violation of this article for any person to authorize any other person to solicit any contribution from the public for any charitable or sponsor purpose within Pinellas County where:

(1) No charitable solicitation permit has been issued;

(2) The charitable solicitation permit has been suspended or revoked;

(3) The charitable solicitation permit has expired; or

(4) The person or organization has not complied with the application requirements of this article.

(b) It shall be a violation of this article for any professional solicitor, professional fundraising consultant, commercial co-venturer, federated fundraising agency or sponsor to solicit on behalf of or in conjunction with any affiliated or client charity before that charity or sponsor has registered and been issued a charitable solicitations permit as required in this article.

(c) It shall be a violation of this article for any charity to contract with any professional solicitor, professional fundraising consultant, commercial co-venturer, federated fundraising agency, or sponsor for the purpose of raising or soliciting funds for the charity or sponsor before the professional solicitor, professional fundraising consultant, commercial co-venturer, federated fundraising agency or sponsor has been issued a charitable solicitations permit by the department as required by this article.

(Ord. No. 93-106, §4.1, 12-7-93; Ord. No. 97-32, § 17, 5-13-97; Ord. No. 98-108, § 12, 12-22-98)

Sec. 42-322. False statement or false information in application for permit.

It shall be a violation of this article for any person to make a false statement or to provide false information in the application for a charitable solicitations permit.

(Ord. No. 93-106, § 4.2, 12-7-93; Ord. No. 98-08, §14, 12-2-98

Sec. 42-323. False statement or deception in connection with solicitation.

It shall be a violation of this article for any person to make or perpetrate a false or misleading statement, deception or fraud in connection with any solicitation of any contribution for any charitable or sponsor purpose or purported charitable or sponsor purpose.

(Ord. No. 93-106, § 4.3.1, 12-7-93)

Sec. 42-324. Implying county endorsement.

It shall be a violation of this article for any person to use or exploit the fact that a charitable solicitations permit has been issued so as to lead the public to believe that such permit constitutes an endorsement or approval by the county of the charitable or sponsor purpose.

(Ord. No. 93-106, § 4.3.2, 12-7-93)

Sec. 42-325. Commingling of contributions.

It shall be a violation of this article for any person, commercial co-venturer, professional fundraising consultant, professional solicitor, federated fundraising organization or sponsor to commingle contributed funds or property with his own funds or property.

(Ord. No. 93-106, §4.3.3, 12-7-93)

Sec. 42-326. Noncompliance with application requirements.

It shall be a violation of this article for any person to fail to satisfy all of the requirements of division 2 of this article.

(Ord. No. 93-106, § 4.3.4, 12-7-93; Ord. 97-32, § 18, 5-13-97)

Sec. 42-327. Soliciting during pendency of suspension or revocation proceedings.

It shall be a violation of this article for any permit holder to solicit in the county pending final action by the director on a notice of intent to suspend or revoke a charitable solicitations permit.

(Ord. No. 93-106, §4.3.5, 12-7-93; Ord. No. 97-32, § 19, 5-13-97)

Sec. 42-328. Transfer or assignment of permit.

It shall be a violation of this article for any permit holder to transfer or assign the charitable solicitations permit.

(Ord. No. 93-106, § 4.3.6, 12-7-93)

Sec. 42-329. Nighttime solicitation to private residence.

It shall be a violation of this article for any person to solicit under this article at or to a private residence between the hours of 9:00 p.m. and 8:00 a.m.

(Ord. No. 93-106, § 4.3.7, 12-7-93; Ord. No. 97-32, § 20, 5-13-97)

Sec. 42-330. Reserved.

Sec. 42-331. Failure to possess and exhibit permit and authorization.

It shall be a violation of this article for any person to:

(1) Fail to have with them, at the time of the solicitation, a copy of a written authorization from the charity or sponsor as well as a copy of the county permit and other permits and/or authorizations as are required by law; and

(3) Fail to exhibit the permit and authorizations required under this section upon command by any law enforcement officer, code enforcement officer, or person being solicited.

Ord. No. 93-106, §4.3.9, 12-7-93; Ord. No. 97-32, § 21, 5-13-97; Ord. No. 98-108, § 13, 12-22-98)

Sec. 42-332. Concealing identity of organization.

It shall be a violation of this article for any person to conceal the identity of an organization on whose behalf solicitations are being made.

(Ord. No. 93-106, § 4.3.10, 12-7-93)

Sec. 42-333. Misrepresenting donations as being tax deductible.

It shall be a violation of this article to misrepresent that the proceeds of any solicitation of funds under current law would entitle the donor to a federal or state income tax deduction.

(Ord. No. 93-106, §4.3.11, 12-7-93)

Sec. 42-334. Failure to maintain proper records.

It shall be a violation of this article to fail to maintain records or to make false statements or to provide false information in the records required under this article.

(Ord. No. 93-106, § 4.3.12, 12-7-93)

Sec. 42-335. Noncompliance with reporting requirements.

It shall be a violation of this article to fail to comply with the reporting requirements of this article.

(Ord. No. 93-106, §4.3.13, 12-7-93)

Sec. 42-336. Surrender of permit.

It shall be a violation of this article to fail to immediately surrender a solicitation permit to the director upon suspension or revocation of the permit.

(Ord. No. 93-106, § 4.3.14, 12-7-93; Ord. No. 97-32, § 22, 5-13-97; Ord. No. 97-65, § 4, 8-12-97))

Sec. 42-337. Unauthorized representation of charitable organization.

It shall be a violation of this article to represent that a contribution is for or on behalf of a charitable organization or sponsor without first being authorized in writing by the charitable organization.

(Ord. No. 93-106, § 4.3.15, 12-7-93; Ord. No. 97-32, § 23, 5-13-97)

Sec. 42-338. Soliciting for individual without establishing depository account.

It shall be a violation of this article to solicit contributions for or on behalf of a named individual without establishing a legal depository account.

(Ord. No. 93-106, § 4.3.16, 12-7-93)

Sec. 42-339. Failure to honor timely request for refund.

It shall be a violation of this article for any person to fail to make a refund of a verified contribution within 30 days after a refund has been requested in writing, provided that the request is made within 60 days of the contribution.

(Ord. No. 93-106, § 4.3.17, 12-7-93)

Sec. 42-340. Improper use of contributions.

It shall be a violation of this article to fail to apply contributions for the stated purpose of the solicitation.

(Ord. No. 93-106, § 4.3.18, 12-7-93; Ord. No. 97-32, § 24, 5-13-97

Sec. 42-341. Use of misleading name or symbol.

It shall be a violation of this article to use a name, symbol, emblem, device, service, mark, or statement so closely related to or similar to that used by another charitable or sponsor organization that the use thereof would mislead the public.

(Ord. No. 93-106, § 4.3.19, 12-7-93)

Sec. 42-342. False representation by solicitor.

It shall be a violation of this article to falsely state that the person making the solicitation is a member of or a representative of a charitable or sponsor organization, or falsely state or represent that such person is a member of or represents a law enforcement or emergency service organization, or falsely state or represent that such person is part of a governmental agency or body.

(Ord. No. 93-106, § 4.3.20, 12-7-93)

Sec. 42-343. Withholding proceeds from sponsor.

It shall be a violation of this article to fail to provide complete and timely payment to a charitable or sponsor organization of the proceeds from a solicitation campaign or sales promotion.

(Ord. No. 93-106, §4.3.21, 12-7-93)

Sec. 42-344. Failure to display required information on contribution receptacle.

It shall be a violation of this article to fail to display the required name, address, telephone number and disclosure information on an unattended contribution receptacle.

(Ord. No. 93-106, § 4.3.22, 12-7-93)

Secs. 42-345—42-355. Reserved.

CHARITABLE SOLICITATION

NEW PERMIT APPLICATION

INSTRUCTIONS

Pinellas County Code (Section 42-292) requires any charitable organization, sponsor, professional fundraising consultant, federated fundraising organization, professional solicitor, or person desiring to engage in solicitation of contributions in the County to file a sworn registration. Failure to register is a Prohibited Act under Division 4. (See section 1.8 for penalties for non-compliance).

Each registration for a Charitable Solicitations Permit shall be accompanied by a **non-refundable** fee. The annual fee is based on gross contributions received or generated during the past financial year. (New organizations are to base their fee on an itemized budget for the coming year.) Make checks payable to: **Board of County Commissioners.**

Fee Schedule:

If Contributions were:

Less than $25,000 - fee is $20.

$25,000 or more, but less than $100,000 - fee is $60.

$100,000 or more, but less than $200,000 - fee is $90.

$200,000 or more - fee is $120.

Contributions must be verified by attaching: (1) the most recent IRS 990/990-EZ filing OR if exempt from filing. (2) completing Sections 14 through 21 of this application, or (3) a copy of an itemized budget certified by an organization officer.

Send the completed application to: **Department of Consumer Protection, Regulatory Section, 14500 49th Street North, Suite 100, Clearwater, FL 33762.** If you have questions, please call (727) 464-7988.

Note: **Be aware that solicitations at or to a private residence from 9:00 p.m. to 8:00 a.m. are prohibited. This includes soliciting by telephone.**

The State of Florida also requires registration under F.S.496. For information, contact the Division of Consumer Services; (800) 435-7352 in Florida, (850) 488-2221 outside Florida; or write: Division of Consumer Services; Mayo Bldg., 2nd Floor, Room 208; Tallahassee, FL 32399.

You must register with the Florida Department of Agriculture and Consumer Services prior to submitting this application. Please attach a copy of the Florida Division of Consumer Services compliance letter.

Type of organization: (_) Charity - IRS 501© (_) Sponsor (_) Other Non-Profit (_) Other For-Profit (_) Individual

Is the applicant a:

____ Corporation ____ Partnership ____ Organization of any other type

Organization information:

Full legal name: _____

Fictitious Name: _____

Additional Program Names Used in Solicitation: _____

LOCAL address: _____

_____

Telephone: ( )_____ Fax: ( )_____

REGIONAL address: _____

_____

Telephone: ( )_____ Fax: ( )_____

NATIONAL address: _____

_____

Telephone: ( )_____ Fax: ( )_____

4. Professional assistance will (____), will not (____) be used.

____ Professional Solicitor ____ Fundraising Consultant/Counsel

____ Commercial Co-Venturer ____ Federated Fundraising Agency (i.e., United Way)

List professional assistance organization:

Name: _____

Doing business as: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

5. Professional Solicitor's Pinellas County Permit Number: _____

Professional's State of Florida registration number [F.S.496.405/409/410]: _____

5A. If contributions are received by the CHARITY/SPONSOR, what percentage of gross charitable contributions is due to the professional firm? (_____%). If not a percentage, state the agreed system of payment and amount due to the professional solicitor. _____

_____

_____

5B. If contributions are received by the PROFESSIONAL FIRM, what percentage of gross charitable contributions is due to the charity/sponsor? (_____%). If not a percentage, state the agreed system of payment and amount due to the charity.

_____

_____

5C. If contributions are received by a THIRD PARTY, what percentage of gross charitable contributions is due to the charity/sponsor (_____%), to the professional firm (_____%), and to third party (_____%)? State the arrangement with the third party.

BEST AVAILABLE COPY

Answer this question ONLY If you checked "Corporation" in Question 2, above:

Date corporation formed:_____ State: _____ Document No. _____

Corporation type: For-Profit (_____), Not-for-Profit (_____) Status: _____

IRS Employer Identification Number (E.I.N.): _____

Contact person who can be contacted if there are problems with this application:

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

Chief elected, executive, or operating officer:

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

Person managing the solicitation described in this application:

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

10. **Treasurer or person with control of financial records:**

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

11. **Manager of telephone room in or operating into Pinellas County:**

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

12. **Location of planned solicitation events(s), if different from organization address:**

_____

13. **Method of Solicitation: (check all that apply):**

(___)Telephone (No Script) (___)Mail (___)Volunteers (___) Paid Staff
(___)Telephone Script Used (Attach) (___)Door to Door (___)Item Sales (___) Bingo/Raffle
(___)Print/Broadcast Media (___)Events/Other - describe: _____

FOR THE COMING YEAR:

Expected GROSS REVENUE: Contributions, Gifts, Direct/Indirect Public Support, Membership Dues, Special Events, etc.

$_____ (Circle based on: Local, State, or National accounting)

CONTRIBUTIONS $_____ (Fee Schedule)

Projected PROGRAM SERVICES: $_____

Anticipated MANAGEMENT AND GENERAL (Expenses):

counting services	$_____	Postage	$_____	Insurance	$_____
vertising/publicity	$_____	Printing	$_____	Labor/services	$_____
mmissions	$_____	Prizes	$_____	Legal fees	$_____
stumes/uniform s	$_____	Professional fees	$_____	Utilities	$_____
corations/favors	$_____	(solicitor, counsel, consultant, co-venturer)		Storage costs	$_____
tertainers/Musicians	$_____	Royalties	$_____	License/permit fee	$_____
uipment (buy/rent)	$_____	Salaries/wages (note above)	$_____	Telephone/fax	$_____
ilding rental	$_____	Security services	$_____	Transportation	$_____
od	$_____	Other _____	$_____	TOTAL EXPENSES	$_____

FUNDRAISING (expenses): $_____

COMPENSATION OF OFFICERS, DIRECTORS, ETC.: $_____

JOINT COSTS (From a Combined Educational Campaign and Fundraising Solicitation/IRS Form 990):

Allocated to Program Services: $_____

Allocated to Fundraising: $_____

Allocated to Management & General: $_____

NET ASSETS OR FUND BALANCES AT BEGINNING OF YEAR: $_____

NET ASSETS OR FUND BALANCES AT END OF YEAR: $_____

2. What is the purpose or work of the organization benefitting from the solicitation?

_____

_____

_____

3. Briefly describe how this work is carried out. Your answer must be sufficiently clear and complete to allow a reader to reasonably understand that there is a system in place or arranged for using the donations substantially in accord with the purpose(s) stated to obtain the donation(s).

_____

_____

_____

4. Has your organization previously registered in Pinellas County for solicitation? Yes (___), No (__).
If yes, under what name? _____

5. Has any director, supervisor, manager, or person with authority to receive and/or disburse solicitation income ever been employed by or a member of another organization registered with Pinellas County for solicitation? Yes (__), No (___).
If yes, name of director, supervisor, manager, or person with authority to receive and/or disburse solicitation and name of other organization._____

_____

_____

Has the applicant or any manager, director, supervisor, advisor, or other person with similar responsibilities [illegible] responsibility over income and distribution of income been convicted in the last five (5) years of a violation of the Pinellas County Charitable Solicitations Code, Florida Statutes Chapter 496, or any other federal, state, or local ordinance, act or law governing theft, fraud, misrepresentation, or the solicitation of funds? Yes (___), No (___). If yes, briefly state the date, place, offense, and penalty:

_____

_____

Has the applicant or any manager, director, supervisor, or other person with similar responsibilities or responsibility over income and distribution of income had, within the previous five (5) years, a permit issued under the Pinellas County Charitable Solicitations Code, or registration under Florida Statutes Chapter 496, suspended, revoked, or by court order been required to cease operation or fined or otherwise sanctioned? Yes (___) No (___). If yes, briefly state the date, place, offense, and penalty:

_____

_____

Is any owner, director, officer, supervisor, manager, or employee of the registrant related as parent, spouse, child, or sibling to any other owner, director, officer, supervisor, manager, or employee of the registrant, or to any director officer, supervisor, manager, or employee of any professional assistance firm or agency involved in a current services contract with the applicant? Yes (___), No (___). If yes, state the persons related, their relationship, and their duties with the organization.

_____

_____

). Is the applicant organization registered with Florida Department of Agriculture and Consumer Services? [F.S.496.405, F.S.496.409, F.S.496.410] Yes (___) Assigned number: _____; No (___); Exempt [F.S.496.403 or F.S.496.406] (___). Registration date: _____; If not registered, date application and check mailed (Attach copies) : _____.

). Attach the following, as applicable:

(1) The organization's prior tax year IRS 990/990EZ tax return or if exempt from filing.
(2) An itemized budget showing anticipated income and expenses.

. The registration or exemption acknowledgment with assigned number provided by the Florida Department of Agriculture and Consumer Services under F.S.496.

. Any contract between the charity and any professional solicitor, federated fundraiser, consultant, or commercial co-venturer.

). If the organization is registered with any other state or agency, send a list of those and include standard disclosure contact information.

.. The Internal Revenue Service Letter of Determination showing the section(s) of the Federal Tax Code under which tax exemption was granted, and any supplementary rulings or advisories.

. A list of the principal officers, directors, managers, or supervisor with responsibility for fundraising. Include name, organization title, address, birth date, and telephone number.

5. Evidence of any fictitious name registration.

l. The wording of a verbal solicitation(s), including any telephone "pitch", and any written or printed material(s) used in the solicitation. These should show disclosures required by Florida law [F.S.496.411].

. If placed or installed devices, canisters, or honor receptacles of any kind are to be used, the wording imprinted on the device or a sample label. Florida law requires disclosures [F.S.496.411]. Pinellas County Code [Section 42-309] requires that the following words be imprinted or affixed on a sticker: "Registered under Pinellas County Code. Registration does not imply endorsement. For information, call the County Department of Consumer Protection, (813) 464-6200."

Verification of contribution income for prior year to determine registration fee. (Do not include grants for fee determination.)

Use this section to verify contribution income to determine your annual registration/permit fee ONLY if your organization DOES NOT file an IRS 990/990-EZ. If you use or have either document, send a copy of that in lieu of using this section.

Prior financial year contribution income received or generated.

Public Contributions	$_____	Item Sales:	$_____
Corporate Contributions	$_____	(Other):_____	$_____
Ticket Sales/Admissions	$_____	(Other):_____	$_____
Raffles/Bingo:	$_____	TOTAL RECEIPTS:	$_____

Certification by the director or a senior authorized officer:

"I affirm the completeness and accuracy of the information in and attached to this application; that no information which would affect the issuance of this permit has been withheld; that I am responsible for the conduct and statements made by persons engaged in solicitation activities outlined herein, and that these comply with Florida Statutes and Pinellas Codes".

Name (Print): _____ Title: _____

Address: _____

_____ Telephone: ( ) _____

Official signature (Sign before a notary):

_____

Notary Certification:

The foregoing instrument was acknowledged before me this ____ day of _____, 19____, by _____

_____, who is personally known to me or who has produced _____ as identification and DID TAKE AN OATH.

Notary Signature and Seal: _____

Notary Printed Name: _____

Notary Address: _____

_____

Telephone: ( ) _____

CHARITABLE SOLICITATION

NEW PERMIT APPLICATION

PROFESSIONAL SOLICITOR/FUNDRAISER/CONSULTANT/COUNSEL

INSTRUCTIONS

Pinellas County Code (Section 42-292) requires any charitable organization, sponsor, professional fundraising consultant, federated fundraising organization, professional solicitor, or person desiring to engage in solicitation of contributions in the County to file a sworn registration. Failure to register is a Prohibited Act under Division 4 (See Section 1.8 for penalties for non-compliance).

Each registration for a Charitable Solicitations Permit shall be accompanied by a **non-refundable** fee. The annual fee is based on gross contributions received or generated during the past financial year (New organizations are to base their fee on an itemized budget for the coming year). Make checks payable to: **Board of County Commissioners.**

Fee Schedule:

If Contributions were:

Less than $25,000 - fee is $20.

$25,000 or more, but less than $100,000 - fee is $60.

$100,000 or more, but less than $200,000 - fee is $90.

$200,000 or more - fee is $120.

Contributions must be verified by attaching your most recent IRS form. Further, send a copy of an itemized budget certified by an organization officer which contains a financial breakdown of monies distributed to each charitable organization for which you solicit.

You must send the completed application to: **Department of Consumer Protection, Regulatory Section, 14500 49th Street North, Suite 100, Clearwater, FL 33762.** If you have questions, please call **(727) 464-7988.**

Note: **Be aware that solicitations at or to a private residence from 9:00 p.m. to 8:00 a.m. are prohibited. This includes soliciting by telephone.**

The State of Florida, Department of Agriculture and Consumer Services, also requires registration under F.S.496. For information, contact the Division of Consumer Services; (800) 435-7352 in Florida, (850) 488-2221 outside Florida; or write: Division of Consumer Services; Mayo Bldg., 2nd Floor, Room 208; Tallahassee, FL 32399.

You must register with the Florida Department of Agriculture and Consumer Services prior to submitting this application. Please attach a copy of the Florida Department of Agriculture and Consumer Services compliance letter.

2. **Type of organization:**

(__) Professional Solicitor (__) Federated Fundraising Agency (__) Fundraising Counsel/Consultant (__) Commercial Co-Venturer

3. **Is the applicant:**

____ Corporation ____ Partnership ____ Organization of any other type

4. **Organization information:**

Full legal name: _____

Fictitious Name: _____

Additional Program Names Used in Solicitation: _____

LOCAL address: _____

_____

Telephone: ( )_____ Fax: ( )_____

REGIONAL address: _____

_____

Telephone: ( )_____ Fax: ( )_____

NATIONAL address: _____

_____

Telephone: ( )_____ Fax: ( )_____

5. **List all client/charitable organizations for which you solicit or provide professional consulting on their behalf.**

NAME OF CLIENT ORGANIZATION	ADDRESS	TELEPHONE	PINELLAS CNTY PERMIT	FL STATE LIC. NO.
1.				
2.				
3.				
4.				
5.				

Note: Please attach additional sheet, if needed.

5. *Answer this question ONLY if you checked "Corporation" in Question 2, above (attach verification):*

Date corporation formed:_____ State: _____ Document No. _____

Corporation type: For-Profit (_____), Not-for-Profit (_____) Status: _____

IRS Employer Identification Number (E.I.N.): _____

ALL APPLICANTS COMPLETE THE REMAINING QUESTIONS:

6. **Contact person who can be contacted if there are problems with this application:**

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

7. **Chief elected, executive, or operating officer:**

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

8. **Person managing the solicitation described in this application:**

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

9. **Treasurer or person with control of financial records:**

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

10. **Manager of telephone room in or operating into Pinellas County:**

Name: _____ Title: _____

Address: _____

_____

Telephone: ( )_____ Fax: ( )_____

Date of Birth: _____ Driver Lic. #: _____ Issuing State: _____

11. **Location of planned solicitation events(s), if different from organization address:**

_____

_____

12. **Method of Solicitation/Fundraising Consulting:** (check all that apply):

(___)Telephone (___)Mail (___)Volunteers (___) Paid Staff

(___)Print/Broadcast Media (___)Door to Door (__)Item Sales (___) Bingo/Raffle

(___)Events/Other - describe: _____

13. **FOR THE COMING YEAR:**

Expected GROSS REVENUE: $_____ (Check appropriate): Percentage Fee Based: _____

Flat Rate Contract: _____

14. Has your organization previously registered in Pinellas County for a Charitable Solicitation Permit? Yes (___), No (__). Has your organization previously registered with any other agency in this or any other state for a charity permit? Yes (___), No (___).

15. Has your organization or any affiliated organization solicited within the confines of Pinellas County for any charity in the last two (2) years? If yes, who and when _____.

16. Has any director, supervisor, manager, or person with authority to receive and/or disburse solicitation income ever been employed by or a member of another organization registered with Pinellas County for solicitation? Yes (__), No (___).

17. Has the applicant or any manager, director, supervisor, advisor, or other person with similar responsibilities and/or responsibility over income and distribution of income been convicted in the last five (5) years of a violation of the Pinellas County Charitable Solicitations Code, Florida Statutes Chapter 496, or any other federal, state, or local ordinance, act or law governing theft, fraud, misrepresentation, or the solicitation of funds? Yes (___), No (___). If yes, briefly state the date, place, offense, and penalty:

_____

_____

18. Has the applicant or any manager, director, supervisor, or other person with similar responsibilities or responsibility over income and distribution of income had, within the previous five (5) years, a permit issued under the Pinellas County Charitable Solicitations Code, or registration under Florida Statutes Chapter 496, suspended, revoked, or by court order been required to cease operation or fined or otherwise sanctioned? Yes (___), No (___). If yes, briefly state the date, place, offense, and penalty:

_____

_____

19. Is any owner, director, officer, supervisor, manager, or employee of the registrant related as parent, spouse, child, or sibling to any other owner, director, officer, supervisor, manager, or employee of the registrant, or to any director officer, supervisor, manager, or employee of any professional assistance firm or agency involved in a current services contract with the applicant? Yes (___), No (___). If yes, state the persons related, their relationship, and their duties with the organization.

_____

_____

_____

20. Is the applicant organization registered with the Florida Department of Agriculture and Consumer Services [F.S.496.405, F.S.496.409, F.S.496.410]? Yes (___); No (___); Exempt [F.S.496.403 or F.S.496.406] (___). Registration date: _____; Assigned number: _____. If not registered, date application and check mailed to the Florida Department of Agriculture and Consumer Services (attach copies of completed application and check).

21. **Attach the following, as applicable:**

A. (1) The organization's prior year's IRS tax return, or

(2) An itemized budget showing anticipated income and expenses.

21. **Attach the following, as applicable: (Continued)**

B. The registration acknowledgement with assigned number provided by the Florida Department of Agriculture and Consumer Services.

C. Any contract between a charity and a professional solicitor, federated fundraiser, consultant, or commercial co-venturer.

D. If the organization is registered with any other state or agency, send a list of those and include standard disclosure contact information.

E. A list of the principal officers, directors, managers, or supervisor with responsibility for fundraising. Include name, organization title, address, birth date, and telephone number.

F. Evidence of any fictitious name registration.

G. The wording of all verbal solicitation(s), including any telephone "pitch", and any written or printed material(s) used in the solicitation. These should show disclosures required by Florida law (F.S. 496.411).

Certification by the director or a senior authorized officer:

"I affirm the completeness and accuracy of the information in and attached to this application; that no information which would affect the issuance of this permit has been withheld; that I am responsible for the conduct and statements made by persons engaged in solicitation activities outlined herein, and that these comply with Florida Statutes and Pinellas Codes".

Name (Print): _____ Title: _____

Address: _____

_____ Telephone: ( ) _____

Official Signature (Sign before a notary):

_____

Notary Certification:

The foregoing instrument was acknowledged before me this _____ day of _____, 19____, by _____

_____, who is personally known to me or who has produced _____ as identification

and **DID TAKE AN OATH.**

Notary Signature and Seal: _____

Notary Printed Name: _____

Notary Address: _____

_____

Telephone: ( ) _____

(8)

No. 99-1647

Supreme Court, U.S.
FILED
SEP 19 2000
CLERK

IN THE

Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SECOND SUPPLEMENTAL BRIEF

MARK J. FITZGIBBONS *
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September 19, 2000

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SECOND SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Supreme Court Rule 15.8, petitioner American Target Advertising, Inc. ("ATA") files this Second Supplemental Brief.

On September 13, 2000, ATA became aware of a proposal by the National Association of Attorneys General/National Association of State Charitable Officials ("NASCO") to require licensing of Internet fundraising activities. ATA became aware of the proposal through an article in the September 7, 2000 issue of *The Chronicle of Philanthropy*. The proposal, called the "Charleston Principles," was first posted on the NASCO web site on or about September 5, 2000. See, www.nasconet.org/stories/storyReader$10, attached hereto at Appendix A, infra.

ATA brings this matter to the attention of the Court to illustrate that registration laws, such as the Utah Charitable Solicitations Act (the "Act") which is the subject of the present litigation, are not the least restrictive means of the accomplishing the purported purposes of such licensing laws. Additionally, the Charleston Principles demonstrate the excessive reach of charitable licensing laws, which apparently now extend to even the most benign speech placed in interstate commerce.

There are several key provisions of the Charleston Principles. Section III. B. 3. provides that "[a]n entity that solicits via e-mail into a particular state shall be treated the same as one that solicits via telephone or direct mail, if the soliciting party knew or reasonably should have known that the recipient was a resident of or was physically located in that state." Because the Act and other charitable solicitation laws require registration of consultants who provide services to nonprofit organizations that send national communications seeking voluntary contributions, consultants will need to obtain licenses in multiple jurisdictions if their nonprofit

clients engage in fundraising on the Internet. Under section III. B., entitled "Entities That Are Domiciled Outside the State," a foreign entity must register in states if "[t]he entity solicits through an interactive Web site" or "[r]eceives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site."

The practical problems associated with such requirements are numerous. Firstly, given that e-mail addresses do not show the state in which the addressee is located, entities will not know whether their Internet fundraising is taking place in a given jurisdiction. Secondly, contributions made by credit card have the same problem. The Charleston Principles do not define under what circumstances an entity should "reasonably" know when it is sending e-mails into a state or receiving contributions therefrom. Thus, entities may be subject to criminal penalties for failure to register even though they do not know the jurisdictions in which recipients of their communications may be domiciled. Such criminal sanctions are applicable to consultants who merely provide advice to organizations that post appeals for contributions on their web sites.

The Charleston Principles also illustrate that the jurisdictions that have charitable licensing laws have taken the path of most resistance under the First Amendment, the Commerce Clause and the due process clause of the Fourteenth Amendment. ATA has freely acknowledged that Virginia, the state in which ATA is located and does business, may require consultants within the state to obtain a license under constitutionally acceptable business licensing laws. Dist. Ct. App. 120. Perhaps more so than direct mail, Internet communications are the extreme example of speech in interstate commerce. The Charleston Principles, like charitable solicitation laws in general, create serious impediments to nonprofit communications, and subject organizations and their consultants to criminal sanctions for the most benign

activities. NASCO is attempting to use charitable solicitation laws as a means to further restrict First Amendment activities by placing burdensome licensing restrictions on speech on the Internet.

A less restrictive means of accomplishing the states' purported goals would be to allow entities to register in the state in which they are located under acceptable business licensing laws, and the licensing state could post such information on the Internet. Section IV. B. of the Charleston Principles readily acknowledges the capacity of states to use this less restrictive means. Instead, however, NASCO has chosen to make Internet fundraising more difficult and convoluted.

The Charleston Principles highlight the fact that these licensing laws are overly burdensome and unnecessarily restrictive of constitutional rights. They create prior restraints without regard to the time, place or manner of an activity. And the threat of criminal sanctions for unknowing violations of these laws will tend to chill First Amendment activities. With the advent of the newest and most expansive medium, the Internet, it is particularly important that the Court decide the constitutional parameters applicable to licensing laws such as the Utah Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 19, 2000

APPENDIX

NASCOnet

THE NATIONAL ASSOCIATION OF STATE CHARITY OFFICIALS WEBSITE

Charleston Principles

The Charleston Principles: On Charitable Solicitations Using the Internet reflects the informal, nonbinding advice of the NASCO Board of Directors to NASCO members. The Charleston Principles have been developed from over a year long process of careful study, analysis and discussion among state charity officials.

The Charleston Principles are so named because dialogue with nonprofit leaders regarding charitable solicitations using the Internet began in October 1999 in Charleston, South Carolina at the 1999 NASCO annual conference.

Putnam Barber, President of the Evergreen State Society and the Internet Nonproft Center, gave the keynote address in Charleston, SC that year. He urged NASCO to use the Internet to create a website that would further the discussion of this important subject. We listened. And here's what we have created.

The topic of charitable solicitations using the Internet will again be the focus of the next annual NASCO meeting. Check out the full agenda at NASCO 2000 AGENDA. This year the conference will be October 16 in San Diego. We also have information on how to register at NASCO 2000 Registration Info.

Comments from nonprofit leaders here on-line and in person in San Diego will inform the NASCO Board as we intend to finalize the Charleston Principles for distribution to our members in early 2001.

Readers are invited to comment on any paragraph of the Charleston Principles—just click on the phrase "Comment on this. . . ." below each paragraph to enter a discussion space reserved for that paragraph alone. There is also an opportunity to comment the entire document which will be found at the bottom of this page.

I.—The Charleston Principles: On Charitable Solicitations Using the Internet

Whereas:

1. Most charitable organizations provide valuable services to society—services that are not provided by government or the private for-profit sector. At the same time, deceptive charitable solicitations, including fraud and misuse of charitable contributions, are significant problems in our country. Reasonable state oversight can remedy or minimize such abuses while facilitating the charitable missions of those who provide needed services to our nation and communities;

Comment on this

2. Registration and financial reporting by charitable organizations and their internal fundraisers, their external commercial fundraisers and, where applicable, their fundraising counsel and commercial co-venturers is critical to (a) providing information to the public in order to increase donor confidence in those who solicit their support and (b) providing information to law enforcers to enable them to fight deception and misuse of contributions;

Comment on this

3. Existing registration statutes generally, of their own terms, encompass and apply to Internet solicitations. The application of those statutes beyond more established fundraising techniques, such as telephone, direct mail, and in-person solicitations, raises a number of issues that state charity officials are often called upon to address;

Comment on this

4. The proliferation of Web site solicitations compels state charity officials to address the issue of who has to register where;

Comment on this

5. State charity officials consistently gain valuable insights when the views of the regulated communities are sought;

Comment on this

6. Consistent guidelines addressing online charitable solicitations will assist state charity officials, as well as donors, charities, and online entrepreneurs, throughout the nation. These Principles have been adopted as guidance to state charity officials, but with the express intention of both creating a climate in which creativity and enterprise in the use of the Internet to support charitable activities is encouraged and in which the public interest is vigorously protected; and

Comment on this

7. Therefore, state charity officials discussed the formation of these Principles while gathered at the National Association of Attorneys General/National Association of State Charity Officials ([base "]NAAG/NASCO[per thou]) Conference in Charleston, South Carolina in October 1999. During the public portion of that conference, which was devoted to the subject of Internet solicitations, state charity officials began a dialogue with invited guests on this topic.

Comment on this

THEREFORE WE, THE BOARD OF DIRECTORS OF NASCO, RECOMMEND THE FOLLOWING

PRINCIPLES:

I.—General Principles

I. A. These Principles are offered as a guide to states as to when charities, and their fundraisers, fundraising counsel and commercial co-venturers may be required to register, or may be subject to enforcement action, and in what jurisdictions, with regard to charitable solicitations via the Internet. States are encouraged to use these Principles to develop common policies to implement their specific state laws, but these Principles are not necessarily the views of any particular individual, office, or state. These Principles recognize that the laws of individual states vary, and that implementation of these Principles may also vary.

Comment on this

I. B. These Principles are necessarily dynamic, and may change as laws, technology and business models change. Further discussions among states and between states and the regulated community are desirable.

Comment on this

I. C. The Internet can be a valuable and efficient forum for conducting charitable solicitations. State charity officials do not desire to discourage or limit its use.

Comment on this

I. D. The basic premise of these Principles is this: Although existing state laws govern charitable solicitations on the Internet, in many instances the use of the Internet raises new questions that state charity officials must answer in order to effectively carry out their statutory missions. Therefore, state charity officials should require registration of

those over whom their state courts could constitutionally assert personal jurisdiction to enforce a registration requirement. State charity officials and those who solicit contributions using the Internet should note that in actions to enforce state laws against deceptive charitable solicitations, including fraud and misuse of charitable funds, jurisdiction typically exists over some organizations not required to register in the state.

Comment on this

I. E. Nothing in these Principles is intended to limit jurisdiction available under common law. The traditional jurisprudence analysis for jurisdiction is the appropriate rule with which states need to comply.

Comment on this

II.—Actions to Enforce State Laws Against Charitable Solicitation Fraud States will enforce the law against any entity whose Internet solicitations mislead or defraud persons physically located within a particular state, without regard to whether that entity is domiciled in the state or is required to register in that state pursuant to these Principles.

Comment on this

III.—Application of Registration Requirements to Internet Solicitation

III. A.—Entities That Are Domiciled Within the State

III. A.1. An entity that is domiciled within a state and uses the Internet to conduct charitable solicitations in that state must register in that state. This is true without regard to whether the Internet solicitation methods it uses are passive or interactive, maintained by itself or another entity with which it contracts, or whether it conducts solicitations in any other manner.

Comment on this

III. A.2. An entity is domiciled within a particular state if its principal place of business is in that state.

Comment on this

III. B.—Entities That Are Domiciled Outside the State

III. B.1. An entity that is not domiciled within a state must register in that state if:

Comment on this

III. B.1.a. Its non-Internet activities alone would be sufficient to require registration;

Comment on this

III. B1.b.(1) The entity solicits contributions through an interactive Web site; and

Comment on this

III. B.1.b.(2) Either the entity:

Comment on this

III. B.1.b.(2)i. Specifically targets persons physically located in the state for solicitation, or

Comment on this

III. B.1.b.(2)ii. Receives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site.; or

Comment on this

III. B.1.c.(1) The entity solicits contributions through a site that is not interactive, but either specifically invites further offline activity to complete a contribution, or establishes other contacts with that state, such as sending e-mail messages or other communications that promote the Web site; and

Comment on this

III. B.1.c.(2) The entity satisfies Principle III.B.1.b.(2).

Comment on this

III. B.2. For purposes of these Principles, each of the following terms shall have the following meanings:

Comment on this

III. B.2.a. An interactive Web site is a Web site that permits a contributor to make a contribution, or purchase a product, by electronically completing the transaction, such as by submitting credit card information or authorizing an electronic funds transfer. A Web site is interactive if it has this capacity, regardless of whether donors actually use it.

Comment on this

III. B.2.b. To specifically target persons physically located in the state for solicitation means to either (i) include on its Web site an express or implied reference to soliciting contributions from that state; or (ii) to otherwise affirmatively appeal to residents of the state, such as by advertising or sending messages to persons located in the state (electronically or otherwise) when the entity knows or reasonably should know the recipient is physically located in the state. Charities operating on a purely local basis, or within a limited geographic area, do not target states outside their operating area, if their Web site makes clear in context that their fundraising focus is limited to that area even if they receive contributions from outside that area on less than a repeated and ongoing basis or on a substantial basis.

Comment on this

III. B.2.c. To receive contributions from the state on a repeated and ongoing basis or a substantial basis means receiving contributions within the entity[base']s fiscal year, or relevant portion of a fiscal year, that are of sufficient volume to establish the regular or significant (as opposed to

rare, isolated, or insubstantial) nature of those contributions. States should set, and communicate to the regulated entities, numerical levels at which it will regard this criterion as satisfied. Such numerical levels should define [base "] repeated and ongoing[per thou] in terms of a number of contributors and [base"]substantial[per thou] in terms of a total dollar amount of contributions or percentage of total contributions received by or on behalf of the charity. Meeting any threshold would give rise to a registration requirement but would not limit an enforcement action for deceptive solicitations. For example, a state might explain that an entity receives contributions on a repeated and ongoing basis if it receives at least one hundred online contributions at any time in a year and that it receives substantial contributions if it receives $25,000, or a stated percentage of its total contributions, in online contributions in a year.

Comment on this

III. B.3. An entity that solicits via e-mail into a particular state shall be treated the same as one that solicits via telephone or direct mail, if the soliciting party knew or reasonably should have known that the recipient was a resident of or was physically located in that state.

Comment on this

III. B.4. Questions may arise as to whether individual charities are required to register in a particular state when the operator of a Web site through which contributions for that charity are solicited or received is required to register, but the charity itself would not independently satisfy the criteria of Principle III.B.1.(b). As to such charities:

Comment on this

III. B.4.a. If the law of the state does not universally require the registration of all charities on whose behalf

contributions are solicited or received through a commercial fundraiser, commercial co-venturer, or fundraising counsel who is required to register, then states should independently apply the criteria of Principle III.B.1.(b) to each charity and require registration only by charities that independently meet those tests; but

Comment on this

III. B.4.b. If the law of the state universally requires registration of all charities under such circumstances, states should consider whether, as a matter of prosecutorial discretion, public policy, and the prioritized use of limited resources, it would take action to enforce registration requirements as to charities who do not independently meet the criteria of Principle III.B.1.(b); and

Comment on this

III. B.4.c. For purposes of this Principle, a charity satisfies the interactivity criterion of Principle III.B.1.b.(2)i if (i) any Web site through which contributions are solicited or received for that charity satisfies that requirement, and (ii) that Web site is operated by an entity with whom the charity contracts. This paragraph does not define the concept of interactivity, but merely addresses the application of that concept in this specific context.

Comment on this

III. B.5.Solicitations for the sale of a product or service that include a representation that some portion of the price shall be devoted to a charitable organization or charitable purpose (often referred to as [base "]commercial coventuring[per thou] or [base "]cause marketing[per thou]) shall be governed by the same standards as otherwise set out in these Principles governing charitable solicitations. Registration is therefore required in those states that require registration for such activities.

Comment on this

III. C.—General Exclusions from Registration

III. C.1. Maintaining or operating a Web site that does not contain a solicitation of contributions but merely provides program services via the Internet[~]such as through a public information Web site[~]does not, by itself, invoke a registration requirement. This is true even if unsolicited donations are received.

Comment on this

III. C.2. 2. Entities that provide solely administrative, supportive or technical services to charities without providing substantive content, or advice concerning substantive content, are not required to register. Such service providers (a) include Internet service providers and entities that do nothing more than process online transactions for a separate firm that operates a Web site or provide similar services, but (b) do not include commercial fundraisers, commercial co-venturers, or fundraising counsel. Administrative, supportive, or technical service providers may be required to register if they do more than simply provide such technical services and actually solicit, promote a Web site or engage in other conduct that requires registration. Compensation for services based on the amount of funds raised may be a strong indication the entity is doing more than simply providing technical services.

Comment on this

IV.—Principles Related to Minimizing Regulatory Responsibilities for Multi-State Filers

IV. A. State charity officials recognize that the burden of compliance by charitable organizations and their agents, professional fundraisers, commercial co-venturers and/or professional fundraising counsel should be kept reasonable in relation to the benefits to the public achieved by registration. The acceptance and use of the Unified Registration Statement

by state charity offices and the development and acceptance of other related projects to create such common forms are strongly encouraged.

Comment on this

IV. B. State charity officials recognize the power of the Internet to assist in the registration of charitable organizations and their agents. State charity offices are strongly encouraged to publish their registration and reporting forms, their laws and regulations and other related information on the Internet to facilitate registration and reporting by charitable organizations and their agents while assuring proper public accountability by regulated entities.

Comment on this

IV. C. State charity officials and charitable organizations have a mutual interest in exploring how to develop the information technology infrastructure so that registration and reporting can be accomplished electronically in the future. Collaboration on this project between state charity officials and charitable organizations, where appropriate, will advance the timeframe for establishing electronic filing. This collaboration may include discussion of the types of information that entities soliciting through the Internet should be required to retain, so that these Principles can be applied to a particular Web site. This would include information sufficient to determine, within the scope of the law and relevant donor privacy concerns, whether an entity[base']s ties to a particular state are sufficient to give rise to a registration requirement.

Comment on this

IV. D. Because disclosure to the public promotes informed giving, charitable organizations are encouraged to satisfy the IRS "widely available" standard by posting, without charge, their current Unified Registration Statement, their last three IRS Forms 990, and their complete IRS Form 1023 or 1024

application and resulting determination letter on their Web pages. Links to other sites that provide such information, including any relevant state agency, or other Web sites, are also encouraged. Such postings, however, do not currently fulfill any applicable registration requirements.

Comment on this

Copyright (c)2000, National Association of State Charities Officials Click on the link below to enter a discussion of general issues and concerns associated with the Charleston Principles. Thank you for your interest and participation.

Comment on this